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Commissioner Fogarty's term expired June 30, 1983.
Commissioner Jones resigned May 31, 1983.
Commissioner Sharp's term expired June 30, 1983.

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–*Amendment of Part 1*

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–*Quincy Cable TV, Inc.*

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–*KOIN-TV, Inc.*

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–*Cable Dallas, Inc.*

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–*Common Carrier Services*
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–Cincinnati Bell Inc.

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(See also: Comparative Criteria-*Thomas C. and Essie L. Collins*)

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Personal Attack, Broadcaster Obligations Regarding
Application for review denied. In order to establish a personal attack for purposes of the personal attack rule, the complainant must establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an "identified" person or group.
–*Brother Rama Behera*

(See also: Fairness Doctrine, Licensee Obligation-*Henry W. Maier*)

Political Broadcasting, Reasonable Access Rule
Petitions to issue Notice of Inquiry for overall renewal/revocation approach to implement Section 312(a)(7) denied. Section 312(a)(7) of Communications Act (reasonable access) requires affirmative right of access to use of broadcast facilities by candidates for federal office.
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Political Candidate, Federal Candidate, Reasonable Access
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Reconsideration, Petition for, Denial of
(See: Common Carrier, Authorization-*Common Carrier Services*)

(See: Administrative Finality-*Quincy Cable TV, Inc.*)

Reimbursement Agreement
Review Board affirms approval of settlement agreement in broadcast proceeding but sets aside ALJ's approvals of specific reimbursement amounts, in light of 1982 amendment of Section 311(c) of the Communications Act, and dismisses appeal asking Board to reduce a party's reimbursement. Such disputes are no longer in the Commission's purview but rather are a matter for local law determination.
-*Bison City TV 49 Limited Partnership*
BC Docket Nos. 81-59-60

Review, Application for
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Settlement
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Suburban Community 307(b) Issue
Report and Order adopted eliminating the suburban community policy, used in licensing AM stations, and its FM corollary, the *Berwick* doctrine. Henceforth, the Commission will presume that compliance with rules pertaining to service to community of license will indicate an applicant's intent to serve that community and not a nearby central city.
-*Suburban Community Policy*
BC Docket No. 82-320

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Affidavit Neef for
Perjury
Oath

Commission amended procedural rules to provide for use of unsworn declarations under penalty of prejury as substitutes for sworn declarations or affidavits. New provision is not applicable to depositions, oaths of office, or oaths required to be taken before specified official, other than a notary public.
–*Amendment of Part 1*

FCC 83–66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part 1 of the Commission's Rules to Provide for the Use of Unsworn Declarations under Penalty of Perjury

ORDER

(Adopted: February 10, 1983 Released: February 17, 1983)

BY THE COMMISSION:

1. The Commission, *sua sponte*, has examined its Rules and Regulations requiring verification of documents filed with the Commission through the use of sworn declarations or affidavits.[1] The Commission finds that this requirement is not in agreement with 28 U.S.C. §1746, which provides that:

> Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury . . ..

2. Accordingly, the Federal Communications Commission hereby

[1] *See, e.g.*, 47 C.F.R. §§1.106, 1.223, 1.229, 73.3525, and 73.3584.

amends its rules to permit the use of unsworn declarations under penalty of perjury as permissible substitutes in those instances where the Commission's rules require sworn declarations or affidavits. Unsworn declarations under penalty of perjury, however, may not be used in connection with: (1) depositions, (2) oaths of office, or (3) oaths required to be taken before a specified official other than a notary.

3. Consistent with the amendment described above, Rule 1.721 also is modified to provide for the use of unsworn declarations under penalty of perjury in the format for formal complaints filed pursuant to Section 208 of the Communications Act.

4. The Commission has formulated the amendment described herein pursuant to the statutory provisions of 28 U.S.C. §1746. Therefore, compliance with the notice and comment provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. §§553(b)(B). Further, the notice and comment and effective date provisions do not apply to these amendments to our procedural rules. *See* 5 U.S.C. §§553(b)(B), 553(d).

5. Authority for these rules is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 303(r). Accordingly, IT IS ORDERED That, effective immediately, §1.16, 47 C.F.R. §1.16, is added and §1.721 of the Commission's rules, 47 C.F.R. §1.721, is amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

Anew Section 1.16, 47 C.F.R. §1.16, is added after 47 C.F.R. §1.14, as follows:

"§1.16Unsworn declarations under penalty of perjury in lieu of affidavits.

Any document to be filed with the Federal Communications Commission and which is required by any law, rule or other regulation of the United States to be supported, evidenced, established or proved by a written sworn declaration, verification, certificate, statement, oath or affidavit by the person making the same, may be supported, evidenced, established or proved by the unsworn declaration, certification, verification, or statement in writing of such person, except that, such declaration shall not be used in connection with: (1) a deposition, (2) an oath of office, or (3) an oath required to be taken before a specified official other than a notary public. Such declaration shall be subscribed by the declarant as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)

(Signature)"."

47 C.F.R. §1.721(b) is amended by removing the form of verification contained therein and inserting, in its place, a new form of verification as follows:

"Form of Verification

I declare under penalty of perjury that I am the complainant (or one of the complainants) in the above-entitled matter; that I have read the foregoing complaint; and that the matter and things therein stated are true and correct. Executed on (date).

(Signature)".

Reimbursement Agreement
Settlement

Review Board affirms approval of settlement agreement in broadcast proceeding but sets aside ALJ's approvals of specific reimbursement amounts, in light of 1982 amendment of Section 311(c) of the Communications Act, and dismisses appeal asking Board to reduce a party's reimbursement. Such disputes are no longer in the Commission's purview but rather are a matter for local law determination.
–Bison City TV 49 Limited Partnership
BC Docket No 81–59

FCC 83R–17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BISON CITY TELEVISION 49 LIMITED PARTNERSHIP Buffalo, New York	BC Docket No 81–59 File No. BPCT–791130LC
UNIFIC BROADCASTING COMPANY OF NEW YORK Buffalo, New York	BC Docket No. 81–60 File No. BPCT–791130LD
For a Television Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: March 11, 1983; Released: March 16, 1983.)

BY THE REVIEW BOARD:

1. By Memorandum Opinion and Order, FCC 82M–3951, released December 13, 1982, presiding Administrative Law Judge (ALJ) Walter C. Miller granted a joint request for approval of a settlement agreement in this proceeding, under which Bison City's application was granted, Unific's application was dismissed with prejudice, and the ALJ specifically approved reimbursement to Unific of $143,539.98 in legitimate and prudent expenses for preparing, filing, and prosecuting its application and an "additional conditional reimbursement" of $93,988.09 to Unific in the event that it is "found liable" in that amount to three former applicants under a prior settlement agreement with them. By Memorandum Opinion

and Order, FCC 83M–64, released January 10, 1983, the ALJ denied Bison City's reconsideration petition, which challenged the propriety of the additional conditional reimbursement, but "as a courtesy" clarified how Unific might be "found liable" for the additional reimbursement. Now before the Review Board is an appeal by Bison City, in which it again challenges the additional conditional reimbursement to Unific, as well as the ALJ's clarification. Unific opposes the appeal, and Bison City has replied.

2. In FCC 82M–3951, *supra*, the ALJ analyzed the proffered settlement agreement under the reimbursement standards that obtained prior to amendment of the reimbursement provisions of Section 311(c) of the Communications Act by Congress. See Communications Amendments Act of 1982, P.L. 97–259, 96 Stat. 1087, September 13, 1982. While this was done at the request of the parties, FCC 82M–3951, *supra* at note 1, we recently held in *Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982),[1] a decision released two days after the ALJ's order and of which he could not have been aware, that the Commission is bound by the modified terms of Section 311(c) in these matters. While the parties may stipulate applicable law in their agreements, we are obliged to apply the Communications Act as amended. Under the 1982 amendments, it is no longer appropriate for the Commission to approve specific reimbursement amounts in settlement agreements because the prohibition against excessive reimbursement has been deleted and the new standard for approval focuses only on whether the agreement is consistent with the public interest, convenience, and necessity and whether any party to the agreement filed its broadcast application for the purpose of reaching or carrying out such agreement. *Texas Television, Inc.*, *supra* at 1270.

3. In the instant case, there is no appearance or assertion that Unific's application was filed for an improper purpose, nor any argument that the parties' joint settlement agreement is not consistent with the public interest. All we have is Bison City's belief that Unific's reimbursement under the agreement should be limited to an amount that is smaller than the maximum ($250,000) that the parties themselves specified. As we indicated in paragraph 2, *supra*, such matters are no longer within the Commission's purview. We agree with the ALJ that enforcement—and, we would add, interpretation—of the Bison City-Unific settlement contract has now become a local law matter to be litigated outside of the Commission's processes. FCC 83M–64, *supra* at note 6. For these reasons, we will dismiss Bison City's appeal as moot and set aside the ALJ's specific reimbursement approvals in FCC 82M–3951 and clarification thereof in FCC 83M–64. What remains is our *sua sponte* affirmance, under *Texas Television, Inc.*, *supra*, of the ALJ's grant of the parties' joint

[1] *Review denied*, FCC 83–95, released March 9, 1983.

request for approval of their settlement agreement, as well as the grant of Bison City's application and the dismissal of Unific's application.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Bison City Television 49 Limited Partnership on January 20, 1983 IS DISMISSED as moot;

5. IT IS FURTHER ORDERED, That FCC 82M–3951, released December 13, 1982, IS AFFIRMED, except for the ordering clauses specifically approving reimbursement amounts, which ARE SET ASIDE;

6. IT IS FURTHER ORDERED, That FCC 83M–64, released January 10, 1983, IS SET ASIDE.

7. IT IS FURTHER ORDERED, That the petition for leave to amend and to accept supplement to joint petition for approval of settlement agreement, filed by Bison City Television 49 Limited Partnership on January 26, 1983, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Personal Attack, Broadcaster Obligations Regarding

Application for review denied. In order to establish a personal attack for purposes of the personal attack rule, the complainant must establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an "identified" person or group.
–Brother Rama Behera

FCC 83–83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of

Brother Rama Behera and Disciples of the Lord Jesus

against

WCCO Television, Inc.

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on September 24, 1982, by Brother Rama Behera and Disciples of the Lord Jesus (hereinafter complainants),[1] of the Broadcast (now Mass Media) Bureau's ruling of August 25, 1982.[2] On October 15, 1982, WCCO Television Inc. licensee of WCCO-TV, Minneapolis, Minnesota, filed an Opposition to the Application for Review.

The Complaint

2. The complaint was based upon the station's broadcast and rebroadcast of the program "Thy Will Be Done" on January 3, 1980, and April 1, 1981, respectively. According to WCCO-TV, "Thy Will Be Done" was a news documentary about religious cults. The contents of this broadcast are set forth in the Bureau's ruling.

3. In their original complaint filed June 4, 1980, complainants claimed that by broadcasting "Thy Will Be Done" the licensee had

[1] Pastor Grant Kemp filed both the initial complaint and the subsequent amended complaint on behalf of Brother Behera and his church, Disciples of the Lord Jesus.

[2] A copy of that ruling is attached (Appendix).

violated the Fairness Doctrine. The initial complaint was denied by the Bureau in its letters of September 16, and October 20, 1980, and April 21, 1981, because complainants failed to establish a *prima facie* Fairness Doctrine complaint. In response to the Bureau's denial of the original complaint, complainants filed a "Petition for Reconsideration,"[3] which raised new matters, including a complaint under the personal attack rule. The Bureau treated the "Petition" as a new complaint.

4. Complainants alleged that WCCO-TV's broadcast and rebroadcast of the program contained personal attacks reflecting upon the honesty, character, integrity or the like personal qualities of Brother Behera and his church. They argued that during the program they were accused of "*DECEPTIVE PRACTICES . . . BRAINWASHING AND HUMAN INDECENCY . . . .*" (Emphasis in original.) They defined the controversial issue of public importance during which the alleged personal attack occurred as "deprogramming." They asserted that WCCO-TV failed to meet its obligations under the personal attack rule (Section 73.1920(a) of the Commission's rules) to notify them within seven days of the broadcast, provide a tape or accurate summary of the broadcast, and present them with an opportunity to reply.

5. The licensee filed a response to the "Petition for Reconsideration" on September 21, 1981. In its response, the licensee maintained that complainants had not established prima facie violations of the Fairness Doctrine and the personal attack rule. Furthermore, it denied that a personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. The licensee argued that the personal attack rule is solely directed at words that relate to the personal credibility or moral turpitude of an individual and, therefore, does not encompass words that are merely derogatory.

6. Because complainants' petition raised a new personal attack complaint, the Bureau requested the licensee's further comments in a letter dated December 7, 1981. On February 9, 1982, the licensee filed a response to the Bureau's inquiry. The licensee maintained that "Thy Will Be Done," one of several WCCO-TV prime time news documentaries, did not deal with "controversial issues of public importance" within the meaning of the Fairness Doctrine. The licensee described the subject program as "a 90-minute prime time examination of mind control as related to religious cults." It asserted

[3] In its August 25 ruling the Bureau stated:

> On May 18, 1981, you filed a brief one page pleading that you characterized as a "Petition for Reconsideration" and in which you stated you would file, "[u]nder separate cover, new facts, additional information and further argument . . . ." On June 29, 1981, you filed a "Petition for Reconsideration," which raised new matters including a personal attack complaint.

that the initial broadcast of "Thy Will Be Done" was followed by a 120-minute "Town Meeting" that featured several persons of diverse viewpoints on the subject matter of the documentary. It stated that the 1981 rebroadcast of the program was followed by a half-hour program that provided time for certain groups, who had objected to some of the content of the original broadcast, to respond to the material in the program. The licensee also stated that in the fall of 1979, and as the program was being produced, efforts were made to interview Brother Behera, and that prior to the original broadcast in 1980, an invitation was extended to him to participate in the "Town Meeting" that followed the broadcast. The licensee further maintained that prior to the 1981 rebroadcast, an invitation was extended to Brother Behera to participate in the half-hour program that followed it. However, the licensee stated, Brother Behera declined all offers made to him. The licensee asserted that, (1) "deprogramming" was not the focus of the program; (2) the issue allegedly discussed was not defined sufficiently; and (3) "deprogramming" was not a controversial issue of public importance within the meaning of the Fairness Doctrine at the time of the subject broadcasts.

7. Even though the licensee denied that any personal attacks occurred within the meaning of the rule, it claimed that the three affirmative requirements of the personal attack rule, notifying the person attacked within seven days of the broadcast, providing a tape or accurate summary of the broadcast, and offering a reasonable opportunity to reply over its facilities, had been substantially satisfied.

8. On March 31, 1982, complainants filed a "Reply" to the licensee's response, in which they denied the licensee's claims that "deprogramming" was not a controversial issue of public importance at the time of the broadcast, and that "deprogramming" was not the subject of the program. They argued that the remarks made during this program constituted an attack upon the honesty, integrity or like personal qualities of Brother Behera and his church. Finally, they denied the licensee's assertion that it had complied with the three requirements of the personal attack rule.

Bureau Ruling

9. In its ruling, the Bureau denied the complaint on several grounds. The Bureau held that there was no need to determine whether "deprogramming" was a controversial issue of public importance at the time of the broadcast since, even if it was, the Bureau could not conclude that the licensee was unreasonable in maintaining that "Thy Will Be Done" did not contain personal attacks against Brother Behera and his church. The Bureau found that complainants had made an unsubstantiated allegation that the deceptive practices, brainwashing and human indecency discussed in the program was understood by the audience as involving Brother

Behera and his church. Citing *Theodore C. Salveter IV, Esq.*, 51 FCC 2d 73 (B/c Bur. 1975), the Bureau stated, "It is not sufficient for purposes of the personal attack rule for an individual to claim that he or she knows that statements made on a program referred to him or her." Consequently, the Bureau held that the licensee was not acting unreasonably when it found that the comments contained in the subject program did not specifically identify Brother Behera and his church for purposes of the personal attack rule.

10. In addressing the issue of whether the licensee complied substantially with the three affirmative requirements of Section 73.1920, the Bureau relied on *L. E. White*, Jr., 11 FCC 2d 687 (1968). There the Commission ruled that in the case of a personal attack, when an offer of time to the complainant is still outstanding, Commission action is not warranted. The Bureau noted that, based on the record, Brother Behera had not accepted the licensee's offers of its broadcast facilities. In view of these circumstances and given Brother Behera's clear awareness of the available opportunity to reply, the Bureau concluded that the licensee was not required to issue a more specific invitation to Brother Behera and his church and, therefore, that the licensee had sought to provide Brother Behera and his church with time to respond.

Application for Review

11. In its Application for Review complainants reiterate their complaint. They allege that since the Bureau did not find it necessary to determine whether "deprogramming" was a controversial issue of public importance in its ruling, it must presume for the purposes of this Application for Review that the subject issue is a controversial issue of public importance. They take issue with the Bureau's holding that the comments in "Thy Will Be Done" did not specifically identify Brother Behera and his church. Citing *Rev. Daniel S. Hamilton*, 50 FCC 2d 330, 331 (B/c Bur. 1974), they argue that what is necessary in order for a person or group to be "identified" in a program is that the identification of the party allegedly attacked be such that "the licensee could reasonably be expected to know exactly who or what finite group is 'best able to inform the public of the contrasting viewpoint.'" Complainants predicate their argument that Brother Behera and his church were "identified" in the subject program, on the fact that efforts to interview him were made and that an invitation was extended to him to participate in the half-hour program that followed "Thy Will Be Done." Complainants claim that the attacks on them were by way of "guilt by association," stating that "while certain direct references were made about Brother Rama and the Disciples, the program 'Thy Will Be Done' taken as a whole and given the manner in which it was edited, associated the complainants with the reprehensible conduct of religious cults, such as that of Jim Jones in Guyana."

12. Complainants disagree with the Bureau's holding that "even if a personal attack was broadcast, . . . the licensee substantially complied with the three affirmative obligations of Section 73.1920." They maintain that after the rebroadcast of the subject program WCCO-TV did not notify them, did not supply to them a script or tape of the program, and did not offer them a reasonable opportunity to respond. Complainants deny the licensee's claim that because the April 1, 1981 program was essentially a rebroadcast of the January 3, 1980 program, it was absolved from its three affirmative obligations under the personal attack rule. They also argue that even "if precedent is reversed and WCCO-TV is deemed to have complied with those requirements because the program was a rebroadcast, WCCO-TV still failed to offer the complainants a reasonable opportunity to respond. They assert that "the reasonableness of the licensee's conduct must be determined in light of the guilt-by-association nature of the personal attack and the fact the program was a rebroadcast."

Opposition to Application for Review

13. In its opposition the licensee maintains that the Application for Review is "substantively devoid of merit." First, the licensee asserts that complainants "failed to demonstrate the unreasonableness of its judgment that the program 'Thy Will Be Done' did not present discussion on such an issue." Within this framework, the licensee contends that "deprogramming" was not the topic and focus of "Thy Will Be Done." Moreover, it argues that "deprogramming" is not and was not a controversial issue of public importance within the meaning of the Commission's rules. The licensee denies having made an attempt in the subject program to discuss the legality of deprogramming or the rights of either side to a deprogramming.

14. Secondly, the licensee questions the complainants' allegation that the Bureau erred in concluding that the comments in the subject program did not specifically identify the complainants. The licensee asserts that although "There is no question that the complainants were mentioned during the course of 'Thy Will Be Done,' . . . the point is that they were not the object of a direct attack on their character, honesty, integrity or similar personal qualities." According to the licensee the complainants' application contained no showing of any specific statements broadcast during the subject program "which directly referred to the complainants in particular *and* which constituted an attack on their character, honesty, integrity, or similar personal qualities." The licensee distinguishes this particular case from cases cited by the complainants on the ground that the commentator on "Thy Will Be Done" noted that there were "differences" as well as "similarities" between the various groups or cults. The licensee then notes that the Bureau determined in its

September 16, 1980 ruling on the first complaint, that the word "cult" does not constitute a personal attack.

15. Finally, the licensee asserts that "Notwithstanding the fact that 'Thy Will Be Done' did not deal with 'controversial issues of public importance,' and notwithstanding the fact that the program did not contain an attack on the character, honesty, integrity, or similar personal qualities of the complainant, WCCO-TV did, nonetheless, substantially comply with the three affirmative obligations of Section 73.1920 of the Rules. . . ." The licensee predicates its assertion of having complied with its personal attack obligations on the fact that the Bureau's ruling dealt solely with the *rebroadcast*of the subject program, which meant that complainants had already viewed the program. The station asserts that the complainants were "intimately familiar" with the program's contents, and were notified of WCCO-TV's plans to repeat it. Therefore, according to the licensee both the personal attack rule requirements to notify the party attacked and provide a tape or summary of the broadcast had in essence been satisfied. Furthermore, the licensee maintains it "made not one, but at least three, distinct offers of a reasonable opportunity for Brother Behera to reply to the alleged attack in the rebroadcast of 'They Will Be Done.'"

Discussion

16. Having carefully examined the pleadings before us, we cannot conclude that complainants have presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that in this case there is no need to determine whether "deprogramming" is a controversial issue of public importance since even if it is, we cannot conclude that "Thy Will Be Done" contained personal attacks against Brother Behera and his church. Within this framework, complainants made "an unsubstantiated allegation that the deceptive practices, brainwashing' and 'human indecency' discussed in the program, would be understood by the general public as involving Brother Behera and his organization." The burden is on complainants to establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an *identified*person or group. The complainants have made no persuasive argument to show the licensee was unreasonable in concluding that the personal attacks were not understood by the viewing audience as being directed against Brother Behera or his church. Although complainants allege that the "deceptive practices," "brainwashing" and "human indecency" discussed in the program were understood by the general public as involving Brother Behera and his church, they do not substantiate this allegation. Furthermore, complainants do not negate the fact that during the program various organizations were discussed

generally and that it was noted that there were *differences* among these organizations. Based upon the information before us, we cannot find that the licensee was unreasonable in concluding that during the discussion of "deceptive practices," "brainwashing" and "human indecency," Brother Behera and his church were not specifically identified.

17. Complainants also have failed to show that under the circumstances of this case the licensee's invitation to them to participate in the half-hour program that preceded the rebroadcast, in addition to WCCO-TV's previous efforts to interview complainants before the program was originally broadcast and its invitation to them to participate in the "Town Meeting" that followed the original broadcast, did not constitute a diligent effort by the licensee to provide complainants with time to respond. Complainants only make bare allegations as to the unreasonableness of the licensee's offers, describing WCCO-TV's offers as nothing more than an attempt "to cast Brother Rama with actors in a format he and the Disciples find repugnant, ..." Noting the invitations and citing, *L. E. White, Jr.*, supra, the Bureau concluded that given the facts of this case, and since Brother Behera was clearly aware that an opportunity to reply was available, the licensee's invitations were specific enough to satisfy its personal attack obligation to provide Brother Behera with opportunity to respond. In this instance, the crux of the matter is not whether the personal attack rule is applicable to the program "Thy Will Be Done," but that the licensee attempted unsuccessfully by letter, by telephone, and in person, both before the original broadcast and before the rebroadcast, to make its facilities available to complainants. Furthermore, the reasons given by complainants for rejecting every one of the licensee's offers was that they did not trust the media and that the format of the response time was unacceptable because of its "guilt-by-association" nature. Complainants provide no evidence to support their allegations. The personal attack rule requires nothing more from broadcast licensees than what WCCO-TV has already done. We agree with the Bureau that we cannot find the licensee unreasonable in this instance. Finally, we also agree with the Bureau that in view of Brother Behera's demonstrated familiarity with the contents of the first broadcast, the licensee was not unreasonable in concluding that it is was not necessary to provide a tape or summary of the program.[4]

18. Accordingly, in view of the above considerations, the Application for Review filed by complainants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[4] In this connection, we note that complainants purchased a tape of "Thy Will Be Done," from the licensee on May 18, 1981, well before their June 29, 1981 pleading. *See Trans America Broadcasting Corp.*, 8 FCC 2d 349 (1967).

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

August 25, 1982

IN REPLY REFER TO
8330-L
C6-1283(81)
C2-253
C3-810

Pastor Grant E. Kemp
Disciples of the Lord Jesus
1040 Forest Hills Drive S.W.
Rochester, Minnesota 55901

Dear Pastor Kemp:

This is in response to your complaint against station WCCO-TV, Minneapolis, Minnesota.[1]

On June 4, 1980, you filed a complaint concerning an alleged Fairness Doctrine violation by the licensee. In our letters of September 16 and October 20, 1980, and April 21, 1981, we denied your Fairness Doctrine complaint because you did not establish a *prima facie* case. On May 18, 1981, you filed a brief one page pleading that you characterized as a "Petition for Reconsideration" and in which you stated you would file, "[u]nder separate cover, new facts, additional information and further argument. . . ." On June 29, 1981, you filed a "Petition for Reconsideration," which raised new matters including a personal attack complaint. In our December 7, 1981 letter of inquiry to the station we informed it that your "petition" was being treated as a new complaint. It is this new complaint that we now consider.

You state that WCCO-TV's broadcast of the program "Thy Will Be Done" on January 3, 1980, and its rebroadcast of this program on April 1, 1981, contained personal attacks reflecting upon the honesty, character, integrity or like personal qualities of Brother Rama Behera and his church, Disciples of the Lord Jesus. You allege that during the program Brother Behera and his church were accused of *"DECEPTIVE PRACTICES . . . BRAINWASHING and HUMAN INDECENCY . . .* ."(Emphasis in original.) You define the controversial issue of public importance, during which the alleged personal attack occurred, as "deprogramming." You allege that WCCO-TV has failed to meet its obligations under the Personal Attack Rule (Section 73.1920(a) of the Commission's rules) by failing to notify you within seven days, provide a tape or accurate summary of the broadcast, and present you with an opportunity to reply. In its September 21, 1981 response to your June 29 pleading,[2] the licensee asserts that you have not established a *prima facie* violation of the

[1] Because of the voluminous correspondence in this case and in order to assure clarity, we have attached an Appendix that provides a chronological summary of this correspondence.

[2] The licensee argues that, if considered to be a Petition for Reconsideration, your June 29 pleading is late and does not provide any additional information. Since the petition is being treated as a new complaint, we need not discuss further the licensee's arguments as to why your petition was procedurally defective. Also, we need not discuss your reply of October 14, 1981, since it comments only on the licensee's pleadings regarding the procedural aspects of your complaint.

Fairness Doctrine and Personal Attack Rule. Furthermore, it denies that a personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. The licensee maintains that the Personal Attack Rule is solely directed at words that relate to the personal credibility or moral turpitude of an individual and, therefore, does not include words that are merely derogatory.

On December 7, 1981, we informed WCCO-TV that your pleadings of May 18 and June 29, 1981, raised a new personal attack complaint, and asked it to comment on its merits. On February 9, 1982, WCCO-TV filed its response. Initially, the licensee explains that the broadcast and rebroadcast of the program "Thy Will Be Done" were part of several prime time news documentaries that were broadcast by WCCO-TV beginning in December 1979 and are still continuing to the present. It maintains that "these documentaries generally did not and do not deal with 'controversial issues of public importance' within the meaning of the Fairness Doctrine." The licensee states that the program "'Thy Will Be Done' was a 90-minute prime time examination of mind control as related to religious cults." It maintains that "[t]he January 3, 1980 broadcast was followed by a 120-minute 'Town Meeting' . . . [that] featured seven or eight persons of diverse viewpoints [on] the subject matter of the documentary." Further, the licensee states that "Thy Will Be Done" was rebroadcast on April 1, 1981, followed by a half hour program that provided time for particular groups, which had objected to some of the content of the original broadcast, to respond to the material in the program. The licensee also states that (1) "in the Fall of 1979 and as [the program] was being produced," efforts were made to interview Brother Behera, and (2) prior to the original broadcast, an invitation was extended to him to participate in the "Town Meeting" that followed the rebroadcast. Furthermore, prior to the rebroadcast an inviation was extended to him to participate in a half hour program that followed it. However, the licensee states that Brother Behera declined all offers made to him by the station. Moreover, the licensee contends that:

> . . . first, "deprogramming" was not the topic or focus of "Thy Will Be Done," second, the issue allegedly discussed has not been defined with any precision whatever, and third, "deprogramming" was not a "controversial issue of public importance" within the meaning of the Fairness Doctrine.

The licensee asserts that no personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. Even if personal attacks were broadcast, the licensee claims that it substantially satisfied the three affirmative requirements of the Personal Attack Rule—it notified the person attacked within seven days, provided a tape or accurate summary of the broadcast, and offered a reasonable opportunity to reply over its facilities.

On March 31, 1982, you filed a "Reply" to the licensee's February 9, 1982 response in which you deny the licensee's claims that: (1) the issue you defined is not a controversial issue of public importance; and (2) it was not the subject of the program. Since you believe that during the program there was a discussion of a controversial issue of public importance, you assert that the remarks made during this program constituted an attack upon the honesty, integrity or like personal qualities of Brother Rama Behera and the Disciples of the Lord Jesus. Finally, you deny the licensee's assertion that it has complied with the three requirements of the Personal Attack Rule.

Discussion

The Personal Attack Rule is a particularization of the Fairness Doctrine.[3] The

[3] In your "Petition for Reconsideration" you do not contend that the broadcasts of "Thy Will Be Done" constituted violations of the Fairness Doctrine. Nor do you deny that the licensee made the aforementioned offers to Brother Behera. Thus,

Fairness Doctrine requires a station to present controversial issues of public importance and to afford reasonable opportunity for the discussion of contrasting viewpoints in its overall programming when it broadcasts one side of such an issue. The Personal Attack Rule is contained in Section 73.1920 of the Commission's rules, and provides in pertinent part:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group, attacked:
>
> (1) Notification of the date, time and identification of the broadcast;
>
> (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
>
> (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

Personal attacks are not prohibited. If a licensee airs a personal attack, it must notify and afford an opportunity for response to the individual or group attacked. The licensee is not required to apologize or make restitution, since the Personal Attack Rule is designed to ensure the public's right to know, rather than redress any loss allegedly suffered by the attacked individual or group. The primary distinction between the requirements of the Fairness Doctrine and those of the Personal Attack Rule is that in the case of a personal attack the licensee is obligated to offer an opportunity to respond to the particular person or group attacked. If the complaint involves a Fairness Doctrine violation the licensee is required to afford an oppurtunity for the presentation of contrasting viewpoints by *any* spokesperson[s] that the licensee reasonably and in good faith chooses.

In codifying the personal attack principle, with its more specific requirements on the licensee, the Commission relied on the fact that in the case of personal attacks there is an identified person or group, which is vitally affected and best able to inform the public of the contrasting viewpoint. *In re Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 723 (1967). In this context, for the rule to apply, the group allegedly attacked must be such that the licensee could reasonably be expected to know exactly who or what finite group is best able to inform the public of the contrasting viewpoint. This is necessary so that the licensee will be able to comply with the rule's affirmative obligation to transmit to that person or group the requisite information and offer to respond. Thus, the licensee is called upon to make reasonable, good faith judgments on the facts of each situation as to whether the group or person is identified sufficiently to come within the rule. The Commission's role is not to substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

As noted above, the Personal Attack Rule applies only to broadcasts that discuss one side of a controversial issue of public importance. However, in this case there is no need to determine whether "deprogramming" is a controversial issue of public importance since, even if it is, we cannot conclude that "Thy Will Be Done" contained personal attacks against Brother Behera and his church. Within this framework, you make an unsubstantiated allegation that the "deceptive practices, brainwashing" and "human indecency," discussed in the program, would be understood by the general public as involving Brother Behera and his organization. It is not sufficient for

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even if "deprogramming" is a controversial issue of public importance, the record indicates that not only did the station make the offers to Brother Behera for an opportunity to reply, but other groups did in fact appear on WCCO-TV to present contrasting views.

purposes of the Personal Attack Rule for an individual to claim that he or she knows that statements made on a program referred to him or her. *Theodore C. Salveter IV, Esq.*, 51 FCC 2d 73 (B/c Bur. 1975). Consequently, since you have not provided us with information to the contrary, we cannot find the licensee unreasonable in its determination that the comments contained in "Thy Will Be Done," do not specifically identify Brother Behera and his church for purposes of the Personal Attack Rule.

Furthermore, even if a personal attack was broadcast, we believe the licensee substantially complied with the three affirmative obligations of Section 73.1920 to notify the party attacked, to furnish a script or tape and to offer a reasonable opportunity to reply. The licensee states that the first two requirements were satisfied because (1) the complaint was based solely on the rebroadcast; (2) Brother Behera was notified that the program complained about would be repeated; and (3) Brother Behera, as evidenced by his continual complaining about the program, in detail for over a year, was already fully conversant with the program. As to the last requirement, the licensee maintains that not only were efforts made to interview Brother Behera prior to the original broadcast and an invitation extended to him to participate in the "Town Meeting" that followed this broadcast, but an invitation was also extended to him to participate in the half hour program that followed the rebroadcast, which provided response time for those groups that had objected to some of the content of the original broadcast. Furthermore, upon viewing this half hour program we noted that each of the participating groups were alloted eight minutes of uninterrupted, unedited time to discuss any parts of the program to which they objected. In this context, we believe the Commission's decision in *L. E. White, Jr.*, 11 FCC 2d 687 (1968), applies. The Commission stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time to Reverend Hargis to respond to the broadcast in question." As we mentioned above, the record here shows that you did not accept the licensee's offers of its broadcast facilities. Under these circumstances, and especially given your clear awareness that an opportunity to reply was available, we conclude that the licensee was not required to issue more specific invitations to you and, therefore, that it diligently sought to provide you with time to respond. *Cf. International Brotherhood of Teamsters (NBC)*, 59 FCC 2d 1317 (B/c Bur. 1976). Moreover, it should be noted that the licensee has discretion in this area, and you have not shown that the licensee's offer of five minutes of uninterrupted response time was unreasonable in these circumstances. Finally, we agree with the licensee that in view of your demonstrated familiarity with the contents of its first broadcast, compliance with *Trans America Broadcasting Corp.*, 8 FCC 2d 349 (1967), which requires that a tape, transcript, or summary of the attack physically accompany the offer of reply time, was not required in this case.

In view of the foregoing, no further action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of public notice of this letter (see Commission's rule 1.4(b)(2) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

APPENDIX

Date of Document	
February 10, 1980	Letter from Disciples of the Lord Jesus to Chairman Ferris.
February 13, 1980	Letter from Pastor Kemp to President Carter.
March 17, 1980	Letter from Chairman Ferris to Pastor Kemp.
March 21, 1980	Letter from Pastor Kemp to President Carter.
April 24, 1980	Letter of information from Bureau to Pastor Kemp regarding his letter to Chairman Ferris.
June 4, 1980	Complaint enclosing: – January 10, 1980: Letter from Pastor Kemp to licensee. – February 25, 1980: Letter from licensee to Pastor Kemp. – March 5, 1980: Letter from Pastor Kemp to licensee.
September 16, 1980	Letter from Bureau to Pastor Kemp.
October 3, 1980	Letter from Pastor Kemp to Bureau.
October 20, 1980	Letter from Bureau to Pastor Kemp.
March 25, 1981	Letter from Pastor Kemp to Bureau complaining about rebroadcast.
April 21, 1981	Letter from Bureau to Pastor Kemp determining that no further action is warranted.
May 18, 1981	Letter from Pastor Kemp to Bureau stating Petition for Reconsideration "is hereby made and submitted."
June 29, 1981	Pleading entitled *Petition for Reconsideration.*
July 27, 1981	Letter from licensee to Bureau confirming extension of time.
July 27, 1981	Letter from licensee to Pastor Kemp enclosing copy of letter sent to Bureau confirming extension of time.
August 20, 1981	Letter from licensee to Bureau confirming second extention of time.
September 9, 1981	Letter of licensee to Bureau confirming third extension of time to him.
September 21, 1981	Licensee response to June 29 pleading.
September 24, 1981	Letter from Pastor Kemp to Bureau confirming grant of extension of time.

October 14, 1981	Pastor Kemp's *Reply* to licensee's response.
December 7, 1981	Letter of inquiry to station.
December 7, 1981	Letter from Bureau to Pastor Kemp enclosing a copy of letter of inquiry sent to the station.
December 29, 1981	Letter from licensee confirming the grant of an extension of time.
December 31, 1981	Letter from licensee noting that a copy of the December 29, 1981 letter, which had not been sent to Pastor Kemp, was being sent.
February 8, 1982	Licensee's response to our December 7, 1981 letter of inquiry enclosing: - December 18, 1979: Letter from licensee to Brother Behera. - December 28, 1979: Letter from Brother Behera to licensee. - January 7, 1980: Letter from Brother Behera to licensee. - September 17, 1980: Letter from licensee to Brother Behera. - October 2, 1980: Letter from licensee to Brother Behera. - October 15, 1980: Letter from Brother Behera to licensee. - February 9, 1981: Letter from licensee to Brother Behera. - February 28, 1981: Letter from Brother Behera to licensee.
February 9, 1982	Letter from Pastor Kemp confirming the grant of an extension of time.
March 31, 1982	Pastor Kemp's *Reply* to licensee's response.

Authority, Delegation of, by FCC
CATV CARS Band
Review, Application for
Zoning

Application for review of grant of CARS station construction permit denied. Bureau Chief did not exceed delegated authority in applying clear precedent. CARS licensee eligibility not jeopardized by disputed application of local zoning laws. *–Cable Dallas, Inc.*

FCC 83–86

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
CABLE DALLAS, INC.	CAR–19062–01
Dallas, Texas	CARS Station
	WGZ–478
Application for Review	

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983; Released: March 14, 1983)

BY THE COMMISSION:

Introduction

1. On June 9, 1982, Warner Amex Cable Communications, Inc. (hereinafter "Warner Amex"), operator of a cable television system serving Dallas, Texas, pursuant to Section 1.115 of the Commission's Rules, filed an "Application for Review" of the action taken by the Chief of the Cable Television Bureau pursuant to delegated authority in *In re Cable Dallas, Inc.* (Dallas, Texas) (adopted May 18, 1982) (hereinafter *"Cable Dallas I"*).[1] Warner Amex's application is opposed by Cable Dallas, Inc. (hereinafter "Cable Dallas"), operator

[1] Simultaneously with its "Application for Review," Warner Amex filed a "Request for Stay" of the Bureau Chief's decision in *Cable Dallas I, supra.* This request was denied by the Bureau Chief, pursuant to delegated authority. *In re Cable Dallas, Inc.* (adopted July 26, 1982).

of cable television systems in Dallas, Texas and permittee of Cable Television Relay Service (CARS) Station WGZ–478, Dallas, Texas.[2] Warner Amex has replied.

2. On October 21, 1980, Video International Productions, Inc. d/b/a Satellite Television Service (hereinafter "VIP") filed an application for a construction permit (CAR–15446–01) to construct a new CARS station in Dallas, Texas. This application was granted on May 12, 1981. *In re Video International Productions, Inc.* (Dallas, Texas) (adopted May 12, 1981). In doing so, the Chief of the Cable Television Bureau found, *inter alia*, ". . . that VIP is the operator of cable television systems and is eligible for CARS licensing," *id.*, pursuant to Sections 76.5(a) and 78.11 of the Rules. VIP served several clusters of apartment buildings in Dallas, each of which is composed of buildings not under common ownership, management, or control, serving more than 50 subscribers. Each cluster is interconnected with cable transmission lines. Therefore, each cluster of interconnected buildings constitutes a separate cable system. However, VIP subsequently sold its cable television systems to Cable Dallas and surrendered its CARS station construction permit for cancellation. *See* Cable Television Actions Report No. 2547, Mimeo No. 346 (released November 4, 1981). Cable Dallas applied for its own construction permit, which was granted *Cable Dallas I, supra*. The Bureau Chief found that, as was VIP, ". . . Cable Dallas is the operator of cable television systems and is eligible for CARS licensing." *Id.* No interference problems were found with Cable Dallas' amended application, nor was pending local litigation concerning Cable Dallas' authority to operate its cable systems in Dallas found to be disqualifying. The Bureau Chief noted that "the grant of a permit in this case confers no Commission right to operate in Dallas," which is a matter of local concern.[3]

Summary of Pleadings

3. In support of its "Application for Review," Warner Amex again argues that Cable Dallas does not operate cable systems as defined by the Commission, and that the surrender and cancellation of VIP's construction permit (*see* paragraph 2, *supra*) necessitates a *de novo* determination of this issue. Warner Amex reiterates its contention that Dallas has officially and finally determined that Cable Dallas' interconnection of apartment buildings violates city zoning ordinances.[4] and therefore that it can neither operate cable

[2] The status of the entities operated by Cable Dallas is a main issue in this proceeding.

[3] Additional issues relating to interference and spectrum utilization were resolved by the Bureau Chief and are not raised in the instant application.

[4] Warner Amex alleges that because Cable Dallas failed to appeal to the Board of Adjustment Inspector's Notice No. 71658 from the Dallas Department of Housing

systems nor be eligible to be a CARS licensee. Warner Amex contends that the pending litigation referred to in *Cable Dallas I, supra*, is an enforcement action to determine a remedy, rather than an action to adjudicate the existence of a violation, and therefore the Bureau Chief's decision will allow Cable Dallas to operate illegally, disregarding an official local determination. Citing the *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket No. 21002, RM-2695, and RM-2723*, FCC 79-228, 71 FCC 2d 569, 571 (1979); *Clarification of the Cable Television Rules*, FCC 74-384, 46 FCC 2d 175 (1974); and the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 207 (1972), Warner Amex argues that the determination to allow cable television service in a particular community is a local decision, and that absent local authorization, the Commission will not issue its own authorization. Finally, Warner Amex asserts that the Bureau Chief's determination in *Cable Dallas I* was beyond the authority delegated him in Section 0.288 of the Rules and was unprecedented and contrary to Commission policy.

4. In its "Opposition to Application for Review," filed June 24, 1982, Cable Dallas argues that it is settled that Cable Dallas operates cable systems composed of interconnected apartment buildings and condominiums not under common ownership, management, and control. Cable Dallas states that it did not purchase its cable systems until November 1981, two months after the date of the Inspector's Notice cited by Warner Amex, and therefore the notice is not applicable to Cable Dallas. In any event, notes Cable Dallas, on June 18, 1982, the City of Dallas withdrew its suit against Cable Dallas. Therefore, claims Cable Dallas, Warner Amex's arguments based on Dallas zoning ordinances are now moot. Cable Dallas contends that the Bureau Chief's decision in *Cable Dallas I, supra*, was not unprecedented, citing *Morehead State University* (Morehead, Kentucky), Mimeo No. 6906, 44 RR 2d 170 (1978); *Citizens Development Corp.* (Lake San Marcos, California), FCC 75-506, 52 FCC 2d 1135 (1975); *Champaign-Urbana Communications, Inc., et al.*, FCC 75-388, 52 FCC 2d 425 (1975); *Pacific Western Mobile Estates, Inc.* (San Jose, California), FCC 74-1058, 49 FCC 2d 269 (1974); and *Bayhead Mobile Home Park* (Leon County, Florida), FCC 74-589, 47 FCC 2d 763 (1974). In addition, Cable Dallas asserts that Warner Amex's citation of the *Clarification of the Cable Television Rules, supra*, is out of date, as it addressed the issuance of certificates of compliance, a practice abandoned by the Commission in the *Report and Order in CT Docket No. 78-206 and RM-3102*, FCC 78-690, 69 FCC 2d 697 (1978). Cable Dallas also suggests that Warner Amex is inconsistent in its pleadings, urging the use of an Inspector's Notice to VIP

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and Urban Rehabilitation within 15 days of the notice's issuance on September 9, 1981, Section 51-4 703(a)(2)(A) of the Dallas Development Code has made this notice a final decision.

against Cable Dallas but challenging the application of *In re Video International Productions, Inc., supra*, to Cable Dallas.

5. Warner Amex filed its "Reply to Opposition" on July 8, 1982. Warner Amex contends that Cable Dallas should not now be allowed to correct its construction permit by stating that it does operate interconnected buildings, but should have its permit rescinded and reprocessed. Moreover, asserts Warner Amex, Cable Dallas' statement establishes that it is in violation of the Dallas Development Code. Warner Amex claims that Cable Dallas is inconsistent in its pleadings, asserting that a Commission determination concerning VIP applies to Cable Dallas but not a Dallas Inspector's Notice. Warner Amex submits a letter from Joseph G. Werner, Assistant City Attorney for the City of Dallas. Warner Amex alleges that Mr. Werner states that Dallas still contends that Cable Dallas is in violation of local law, but "expresses no opinion as to Cable Dallas' eligibility to receive a CARS license." Citing *Northbanke Corp., et al.*, FCC 79–548, 46 RR 2d 453, 457 (1979), and *J. Sherwood, Inc., et al.*, FCC 76R–278, 63 FCC 2d 151 (1976), Warner Amex argues that a zoning agency's adverse initial decision rebuts the ordinary presumption of zoning authority. Here, Warner Amex maintains, such an adverse initial decision has been made by both the agency and by the City of Dallas itself, to which the Commission should defer, citing *Lester H. Allen, et al.*, FCC 69R–475, 20 FCC 2d 478 (1969), and *Big Chief Broadcasting Co. of Lawton, Inc., et al.*, FCC 69R–420, 20 FCC 2d 127 (1969). Warner Amex reiterates its arguments that Commission authorization cannot issue in this situation, and argues that *CT Docket No. 78–206 and RM–3102, supra*, was not meant to alter substantive rule provisions. Absent requisite local authority, asserts Warner Amex, "the Commission must deny the authority to operate as an FCC sanctioned 'cable television system' . . .," citing, *inter alia*, *Keystone Cable-Vision Corporation*(Pittsburgh, Pennsylvania), FCC 77–860, 67 FCC 2d 348 (1977), *recon. denied*, FCC 78–542, 68 FCC 2d 1419 (1978); *Teleprompter Cable Communications Corp. d/b/a South Jersey Television Cable Co., et al.*, FCC 76–385, 59 FCC 2d 251 (1976); and *Bayhead Mobile Home Park, supra*. Warner Amex argues that FCC Form 327 on which Cable Dallas' application for construction permit was submitted requires an applicant to possess all requisite local authority pursuant to the former Certificate of Compliance rules because the standard form allows an applicant to indicate a Certificate of Compliance as authorization for a signal to be relayed by the CARS station. Finally, Warner Amex reiterates its contention that the Bureau Chief's action in *Cable Dallas I, supra*, exceeded his delegated authority.

Discussion

6. For the most part, Warner Amex reiterates its earlier arguments which we find the Bureau Chief fully considered and

properly disposed of in his decision. Warner Amex itself admits that Cable Dallas operates an interconnected system. This admission is sufficient for this Commission to determine that the entity is physically a cable system.

7. Failing to establish that Cable Dallas does not qualify physically as a cable system, Warner Amex argues that the interconnection violates Dallas' zoning ordinances. Consequently the granting of the CARS license somehow sanctions an illegal act and thus interferes with Dallas' exercise of its municipal authority. We do not find Warner Amex's arguments in this regard to be persuasive. Warner Amex asserts that Cable Dallas' failure to appeal the September 1981 Inspector's Notice to VIP within fifteen days of the notice's issuance makes the notice final, and binding against Cable Dallas. We note that this contention was not made by Dallas in its suit against Cable Dallas, *City of Dallas v. Cable Dallas, Inc., et al.*, No. 81–13327–I (162d Judicial District, Dallas Co., Texas, filed Nov. 23, 1981). Moreover, and far more important, that suit has now been dismissed at the request of the city. In lieu of formal court proceedings, Warner Amex has submitted a letter from Assistant City Attorney Joseph G. Werner concerning the effect of the dismissal of this case on June 18, 1982. However the letter specifically "expresses no opinion as to Cable Dallas' eligibility to receive a CARS license," nor does it address the question of the effect on and applicability to Cable Dallas of the September 9, 1981 Inspector's Notice to VIP. In any event, the Bureau was correct in noting a grant of this licensee does not confer any right on Cable Dallas to operate in the City of Dallas.[5] That is a matter to be determined under local law.

8. Warner Amex's assertions stemming from our former certification process for cable systems are entirely misplaced. FCC Form 327 addresses the question not of operating authorization, but of carriage authorization, which has been settled in relevant part by Cable Dallas' registration of its signal carriage, pursuant to Section 76.12 of the Rules. *See Keystone Cable-Vision Corporation*(Pittsburgh, Pennsylvania), FCC 82–15, 88 FCC 2d 1072, 1073 (1982); *CT Docket No. 78–206 and RM–3102*, 69 FCC 2d at 703. This precedent is clear, as is other precedent relied on by the Bureau Chief, and we find that he did not exceed his delegated authority in deciding *Cable Dallas I*. The Commission no longer requires Certificates of Compliance for cable system operation, nor does the Commission any longer require compliance with the franchise standards of former Section 76.31(a) of the Rules. A check for compliance with those standards and access related rules was a major reason for requiring the

[5] The cases cited on this point in paragraph 5 by Warner all relate to site availability in broadcast comparative licensing proceedings, which are of no relevance to this case, especially since the sites are available.

submission of local franchises. Registration statements required by the Commission pursuant to Section 76.12 of the Rules are for informative purposes. *See Keystone Cable-Vision Corporation, supra*; *CT Docket No. 78–206 and RM–3102, supra*. Essentially, through this proceeding, Warner Amex has been seeking Commission intervention in a matter of local policy and concern where the responsible local authority has declined to pursue the matter further. This is not this Commission's function. *See Keystone Cable-Vision Corporation*, 88 FCC 2d at 1073.

In view of the foregoing, we find that grant of Warner Amex's "Application for Review" is not in the public interest.

Accordingly, IT IS ORDERED, That the "Application for Review" filed June 9, 1982, by Warner Amex Cable Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Cellular Communications Systems
Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular Applications

Commission approved agreements of nonwireline applicants in cellular service for Indianapolis, Indiana and Milwaukee, Wisconsin, Standard Metropolitan Statistical Areas. Commission found agreements in the public interest since they eliminate hearings and will provide for a needed service without delay. *–Cellular Communications Systems*

FCC 83–70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CELLULAR MOBILE SYSTEMS OF INDIANA, INC.	File No. 26172–CL–P–(11)–82
MIDWEST MOBILEPHONE CORP.	File No. 26060–CL–P–(4)–82
WESTEL-INDIANAPOLIS COMPANY	File No. 26112–CL–P–(7)–82
For a Construction Permit to establish a cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Indianapolis, Indiana, Standard Metropolitan Statistical Area	
In re Applications of	
WESTEL-MILWAUKEE COMPANY, INC.	File No. 26128–CL–P–(6)–82
CELLULAR MOBILE SYSTEMS OF ILLINOIS, INC.	File No. 26174–CL–P–(6)–82
For a Construction Permit to establish a cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Milwaukee, Wisconsin, Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER

(Adopted February 17, 1983: Released March 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES DISSENTING IN PART AND ISSUING A STATEMENT.

1. Presently before the Commission are Joint Requests for Approval of Settlement Agreement and Related Relief filed by the three captioned nonwireline applicants for the Indianapolis, Indiana, Standard Metropolitan Statistical Area and the two captioned nonwireline applicants for the Milwaukee, Wisconsin, Standard Metropolitan Statistical Area (SMSA).[1] The Indianapolis agreement appeared on Public Notice No. 1092, dated November 30, 1982, and the Milwaukee agreement on Public Notice No. 1204, dated December 7, 1982. No comments were received on either agreement.

2. *Indianapolis Settlement Agreement.* On November 19, 1982, Cellular Mobile Systems of Indiana, Inc. (CMS), Midwest Mobilphone Corp. (Midwest) and Westel-Indianapolis Company (Westel) filed the cited Joint Request for Approval of Settlement Agreement and Related Relief.[2] The Settlement (or Partnership Agreement) basically provides for a merger of interests of all the nonwireline cellular applicants in the Indianapolis market. The new partnership, Indianapolis Telephone Company (ITC) is comprised of the three applicants, who will participate equally in the partnership. The partnership will establish a cellular communications system and offer cellular service both directly to the public and to resellers in Indianapolis upon grant of authorization by the Commission. Each applicant will make an initial capital contribution of $1,666,667 and will assume an equal share of the risks and benefits of the venture. Each partner will name an equal number of members to the Partners Committee which will conduct the business affairs of the

[1] Four applications were filed in Indianapolis and two in Milwaukee requesting the wireline allocation (frequency block B). Settlement agreements were filed for both SMSAs. *See* Public Notice, Mimeo 737, Report No. CL–6, released November 10, 1982. We will consider the wireline allocations in a separate order.

[2] On September 21, 1982, the Commission was notified of an understanding to settle the proceeding without the need for a comparative hearing by a Notification of Settlement. On September 29, 1982, James M. Carpenter filed an Opposition to Notification of Settlement. In his opposition Carpenter makes general allegations concerning a conspiracy to keep him out of business by wireline carriers and the Commission, rearguing allegations made in his petition for reconsideration of the Common Carrier Bureau's action returning as defective his application for a cellular system in Indianapolis. *See, Carpenter Radio,* FCC 83–51, released January 31, 1983. He requested that the Notification of Settlement be stricken or designated for hearing. We find that Carpenter's Opposition fails to raise any substantial issues and, therefore, is denied. It should be noted that Carpenter did not file any comments against the settlement agreement during the prescribed comment period.

partnership. The agreement contains the typical covenants and conditions of a partnership agreement.

3. The applicants have agreed to amend and prosecute the application of CMS. An amendment to substitute ITC for CMS as the applicant has been filed. The applicants request, pursuant to section 22.29 of the Commission's rules, that the Commission approve the settlement, permit withdrawal of the petitions to deny the CMS application, accept the amendment of the CMS application effectuating the merger, grant the application as amended and dismiss the applications of Midwest and Westel. The applicants also request exemption from the requirements of section 22.31 and section 22.29(e), if applicable.

4. *Milwaukee Settlement.* On December 1, 1982, Westel-Milwaukee Company, Inc. and Cellular Mobile Systems of Illinois, Inc., filed a Joint Request for Approval of Settlement Agreement and Related Relief. The new partnership, Milwaukee Telephone Company (MTC), formed on December 1, 1982, provides for a merger of interests of the two Milwaukee nonwireline cellular applicants. The partnership agreement contains essentially the same clauses and covenants as the Indianapolis agreement except the Partners' Committee will consist of five members, two representatives appointed by each partner, and a fifth member appointed with the unanimous consent of the partners to serve for a one-year term. Each partner will make an initial capital contribution of $2,000,000 and assume an equal share of the risks and benefits of the venture. The agreement provides that if the partners are in substantial disagreement as to the conduct of the partnership's business and that the disagreement, if unresolved, can impair the functioning of the business, then either partner can demand that the other sell its interest in the partnership to the "offering partner". Section 7.3 of the agreement.

5. The applicants have agreed to amend and prosecute the application of Westel and substitute MTC as the applicant. They request that the Commission approve the settlement, permit withdrawal of the petition to deny filed against the Westel application, accept the amendment to the Westel application effectuating the merger, grant the application as amended and dismiss the application of CMS.

6. *Discussion.* In prescribing the regulatory structure and procedures for the establishment of operational cellular systems, this Commission has taken particular cognizance of the fact that the delays in the delivery of cellular service necessitated by comparative hearings among competing applicants would be inimical to the public interest in the rapid deployment of this new technology. Accordingly, we have explicitly stated that we "encourage settlements" among competing applicants to speed the provision of needed cellular service to the public. *See Cellular Communications Systems*, 86 FCC 2d 469, 490–91 (1981), 89 FCC 2d 58 (1982) at para. 38. Our

policies of encouraging settlement on both the wireline and nonwireline side also foster competition. They avoid the problem of having one applicant capture the market and thereby develop a monopoly. The Commission, therefore, favors such agreements since they further our policies of competition and expedited service to the public.[3]

7. After review of the Settlements and Partnership Agreements and related pleadings, we conclude that the parties have shown that approval of their agreements is in the public interest. The agreements will eliminate the need for costly and time consuming hearings and will provide for a needed new service without delay. They also promote the Commission's objective of providing cellular service to the public in the shortest possible time. We have carefully examined the technical proposal of CMS in Indianapolis and Westel in Milwaukee and the financial, legal and technical qualifications of CMS, Westel and Midwest. Based on our examination, we conclude that the parties have demonstrated that each is legally, technically[4] financially and otherwise qualified.[5]

8. Basic qualifying issues against the parties were raised in the petitions to deny filed against each respective application. Even though we are dismissing the petitions, we will consider the basic qualifying issues. It was alleged that Graphic Scanning Corp., CMS'

[3] The settlement agreement among the four wireline applicants in Indianapolis and the two in Milwaukee became ripe for our consideration when the pleading period expired on January 6, 1983. The United States Department of Justice (DOJ) filed comments on November 22, 1982, seeking clarification of our wireline settlement policy. To the extent DOJ's comments may be relevant as well to nonewireline settlements, we will address them in dealing with the wireline settlements.

[4] In our review of the CMS (Indianapolis) and Westel (Milwaukee) applications we have discovered discrepancies or conflicts in some of the technical proposals. We are, therefore, ordering ITC and MTC to file technical amendments, and we will condition the grants upon compliance with our order. We have also found that CMS' proposed Cellular Geographic Service Area (CGSA) and 39 dbu contours for cells numbers 6 and 7 extend beyond the Indianapolis SMSA into Bloomington, a secondary SMSA, and into Rush and Henry Counties, non-SMSA areas, respectively. CMS justifies the extensions for technical reasons, i.e., that they are necessary to efficiently and comprehensively serve the Indianapolis CGSA. Westel's CGSA and 39 dbu contours for cells B (West Allis), C (West Bend), D (Delafield) and E (Richfield) also extend beyond the Milwaukee SMSA into Racine, a secondary SMSA, and Dodge, Fondulac and Jefferson Counties, non-SMSA areas. The extensions are allowed under the rules, they cover small areas and there is no apparent effort to cover a population center in another SMSA. *Cf.* Advanced Mobile Phone Service, et al. (Philadelphia Order), CC Mimeo 1882, released January 21, 1983. However, we will condition the authorizations to the effect that they will not be protected in these areas, and if another licensee is awarded a grant for these areas, the Indianapolis and Milwaukee operators will have to coordinate with the adjacent system(s) licensee and provide interference free operation. The coordination may require the Indianapolis and Milwaukee licensees to pull back the CGSA and 39 dbu contours. *See* Section 22.902(d) of the rules.

[5] CMS' qualifications are discussed in para. 8, *infra.*

parent and one of its subsidiaries, Graphnet, are wireline carriers; thus CMS could not apply for the non-wireline block of frequencies in cellular markets. Essentially the same allegation was raised against Westel, *i.e.*, that Western Union Telegraph Company, parent of Western Union Cellular Technologies, a 21.1% stockholder of Westel, is a wireline carrier. Neither Graphic nor Western Union is a carrier that falls within the meaning of Section 22.902 of the Commission's rules referring to carriers engaged in the business of affording public landline message telephone service. Therefore, their subsidiaries are elegible to apply for the nonwireline block of cellular frequencies. *See Xerox Corp. and MCI Communications Corp.*, 90 FCC 2d 547 (1982); *See also, Xerox Corporation*, 74 FCC 2d 471 (1970), and Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. §222. We have previously found CMS financially qualified to construct and operate the cellular systems it proposed. *See Advanced Mobile Phone Service, et al. (Chicago Order)*, FCC 82–452, released November 1, 1982. We also find that Midwest and Westel have sufficient financial resources to meet their partnership obligations. CMS' and its parent Graphic Scanning Corp.'s qualifications may be affected by the issues being investigated in *A.S.D. Answer Service, Inc. et al.* (*ASD*), FCC 82–391, released August 24, 1982. Section 8.4 of the Partnership Agreements provides for this possibility. We will reserve the right to reexamine and reconsider the qualifications of CMS to have an interest in a cellular license, should *ASD* be resolved adversely to any of CMS' affiliate or parent companies or to any of their principals. *See, Chicago Order, supra* at n.19. In this regard, Section 7.2 of the Partnership Agreements provide a mechanism for disposing of the interest of any partner who may ultimately be found unqualified to hold a cellular license (Right of First Refusal-Third Party Transactions).

9. The applicants request exemption from the cut-off provisions of Section 22.31 of the rules involving the impact of major amendments on the status of an application. We conclude that good cause exists for the exemption and the same will be granted pursuant to Section 22.31(e)(3) and (4). They also request, if applicable, waiver of the detailed accounting requirements of Section 22.29(e). We conclude that the detailed accounting requirements of Section 22.29(e) apply only to reimbursement or buy-out agreements and not to *bona fide* merger of interests as in this case, where there is no reimbursement to the dismissing applicants. The agreements do not contemplate that either of the dismissing applicants will be reimbursed for expenses incurred in prosecuting their applications. *See Domestic Public Land Mobile Radio Service*, 60 FCC 2d 549, (1976) 559, *Baird Communications*, Inc., 88 FCC 2d 381 (1981); *Houston Radiophone Service*, 75 FCC 2d 624 (1980). *See also Revision and Update of Part 22*, CC Docket No. 80–57, FCC 82–349, released September 8, 1982, 47 Fed. Reg. 43842, at A–54–55.

Ordering Clauses—Indianapolis

10. Accordingly, IT IS ORDERED, pursuant to Section 22.29 of the Commission's Rules, that the Joint Request for Approval of Settlement Agreement and Related Relief, filed by Cellular Mobile Systems of Indiana, Inc., Midwest Mobilphone Corp., and Westel-Indianapolis Company IS GRANTED, and the accompanying November 11, 1982, Partnership Agreement IS APPROVED.[6]

11. IT IS FURTHER ORDERED that the amendment to the Cellular Mobile Systems of Indiana, Inc. application IS ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4); and the amended CMS application, hereinafter, Indianapolis Telephone Company, File No. 26172–CL-P–(11)–82, IS GRANTED, subject to compliance with the conditions listed below.

12. IT IS FURTHER ORDERED that the request for withdrawal of the applications filed by Midwest Mobilephone Corp., File No. 26060–CL–P–(4)–82, and Westel-Indianapolis Company, File No. 26112–CL–P–(7)–82 IS GRANTED and the applications and the petitions to deny filed against them are DISMISSED.

13. IT IS FURTHER ORDERED that the request for withdrawal of the petitions to deny filed against the CMS application by Midwest and Westel IS GRANTED and the petitions are DISMISSED.

14. IT IS FURTHER ORDERED that the Opposition to Notification of Settlement filed by James M. Carpenter on September 29, 1982 IS DENIED.

15. IT IS ORDERED that the authorization is conditioned upon the Indianapolis Telephone Company filing the following amendments:

(a) Resubmit site availability letters for sites 7, 8 and 9 since the ones submitted were not legible. Resubmit site availability letters for sites 1 and 2 since the ones submitted did not correspond to the locations proposed in the engineering exhibit.

(b) The radiation center height above average terrain for site No. 10 seems unusual. Topographic maps used to determine the two to ten averages for the eight radials and showing location plot for the site should be submitted. If it is determined that the radiation center height above average terrain is incorrect file a revised engineering proposal. This should include any revisions to height/power and service contour calculations and necessary maps revisions indicating appropriate 39 dbu contours and CGSA.

[6] We remind the partners that pursuant to Section 212 of the Communications Act of 1934, as amended, officers or directors of more than one carrier are required to have authorizations to hold interlocking directorships.

16. IT IS FURTHER ORDERED that the authorization is conditioned upon the Indianapolis Telephone Company obtaining the appropriate antenna structure clearances.

17. IT IS FURTHER ORDERED that the Commission reserves the right to reexamine and reconsider the qualifications of CMS to be a Commission licensee following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82–391, released August 24, 1982.

18. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Indianapolis SMSA, and further conditioned upon the Indianapolis Telephone Company coordinating with future licenses of the Bloomington SMSA, Henry and Rush Counties and upon providing interference free operation in these areas.

Ordering Clauses Milwaukee

19. IT IS FURTHER ORDERED, that the Joint Request for Approval of Settlement Agreement and Related Relief, filed by Cellular Mobile Systems of Illinois, Inc. and Westel-Milwaukee Company, Inc. IS GRANTED, and the accompanying December 1, 1982, Partnership Agreement IS APPROVED.[7]

20. IT IS FURTHER ORDERED that the amendment to the Westel-Milwaukee Company, Inc. application IS ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4), and the amended Westel application, hereinafter, Milwaukee Telephone Company, File No. 26128–CL-P–(6)–82, IS GRANTED.

21. IT IS FURTHER ORDERED that the request for withdrawal of the application filed by Cellular Mobile Systems of Illinois, Inc., File No. 26174–CL-P–(6)–82 IS GRANTED and the application and the petition to deny filed against it are DISMISSED.

22. IT IS FURTHER ORDERED that the request for withdrawal of the petition to deny filed against the Westel application by CMS IS GRANTED and the petition is hereby DISMISSED.

23. IT IS FURTHER ORDERED that the authorization is conditioned upon the Milwaukee Telephone Company filing the following amendments:

(a) Resubmit site availability letters for sites A and C since the ones submitted did not correspond to the locations proposed in the engineering exhibit.

(b) Submit calculations or appropriate amendments for sites A, D and F. Our calculations demonstrate that the ERP at these sites exceeds 100 watts. Pursuant to Rule 22.904 Milwaukee Telephone Company will only be authorized to operate at a maximum of 100 watts in any radial direction.

[7] See note 6, *supra*.

24. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Milwaukee SMSA, and further conditioned upon the Milwaukee Telephone Company coordinating with future licensees of the Racine SMSA, Dodge, Fondulack and Jefferson Counties and upon providing interference-free operation in these areas.

25. IT IS FURTHER ORDERED that the authorization is conditioned upon Milwaukee Telephone Company obtaining the appropriate antenna structure clearances.

26. IT IS FURTHER ORDERED that the Commission reserves the right to reexamine and reconsider the qualifications of CMS to be a Commission licensee following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82–391, released August 24, 1982.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Separate Statement
of
Commissioner Joseph R. Fogarty

In Re: Approval of Nonwireline Cellular Service Applicant Settlement Agreements for Indianapolis, Indiana, and Milwaukee, Wisconsin, SMSAs.

In my Separate Statement accompanying the Commission's *Cellular Reconsideration* Order, I said that "[I]t is imperative that competing applicants be encouraged in the strongest terms to settle their differences by joint venture or other agreement so as to avoid the delay of comparative hearings–delay which can only work to the detriment of the public interest in the expeditious provision of cellular service."* I am certainly pleased that my advice is being heeded on both the wireline and nonwireline sides of the cellular split frequency allocation.

As a result of these settlements and today's Commission action, not only will two more cellular systems be implemented in two major metropolitan areas, but also two nonwireline companies may well attain "headstarts" over their wireline competitors. These developments demonstrate clearly that the headstart issue is a "two-way street" where, as here, nonwireline applicants agree to resolve their comparative hearing differences and to expend their resources and energies instead on providing cellular service to the public.

The Commission's efforts throughout the cellular rulemaking have been directed toward satisfying the demonstrated public demand for high-quality mobile telephone service. The settlement agreements which we approve here significantly advance this

*89 FCC 2d at 110 (1982).

fundamental objective. I want to repeat my counsel to all competing cellular applicants: "Settle!"

February 28, 1983

Statement
of
Commissioner Anne P. Jones

Dissenting in Part

I am delighted to approve the overall result of this decision which will make cellular service available in Indianapolis and Milwaukee in the near future. Nonetheless, I must dissent from the language of the decision which espouses a Commission policy of encouraging settlements as a means of avoiding comparative hearings among competing cellular applicants. I am disturbed that instead of reforming or streamlining our comparative processes to handle these situations, we attempt to sidestep our responsibilities and place the burden of finding a way to shorten the process on the applicants. In my opinion, encouraging the kind of compromises that must result from such forced settlements will deny the public the benefits that competitive entry would foster and run contrary to the purpose of the antitrust laws. I therefore dissent from that notion.

Common Carrier, Data Processing Service
Common Carrier, Specialized Services
Computer Terminals Equipment

Order adopted granting petitions for reconsideration of Commission order released October 20, 1981, 88 FCC 2d 33, and terminating stay order released June 16, 1982, 90 FCC 2d 233. Order granted waiver of Computer II structural separation requirements for the two companies.
–*Cincinnati Bell Inc.*

FCC 83–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Motion of Cincinnati Bell Inc. for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission Decisions in the Second Computer Inquiry (Docket No. 20828)

Motion of Southern New England Telephone Company for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission's Decisions in the Second Computer Inquiry (Docket No. 20828)

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. We have before us petitions for reconsideration filed by Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET). In these petitions as supplemented to reflect imminent changes in the Bell System corporate structure and operations, CBI and SNET urge the removal of any structural separation requirements which we would impose on them for the provision of customer premises equipment (CPE) and enhanced services. These requirements were established for AT&T and its affiliated carriers in the *Second Computer Inquiry (Computer II)*[1]. We made clear that these requirements applied to CBI and SNET in our

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Final Decision), modified on reconsideration, 84 FCC 2d 50 (1980),

subsequent *Memorandum Opinion and Order (Order)* released October 20, 1981, 88 FCC 2d 33. Subsequently we issued a stay of the obligations imposed upon CBI and SNET because of the substantial uncertainty created by the then pending Modification of Final Judgment in the case of *U.S. v. Western Electric Company*, C.V. 17–49 (D.N.J. 1956) (proposed MFJ). *See Memorandum Opinion and Order ("Stay Order")* released June 16, 1982, 90 FCC 2d 233 (1982). This MFJ has been entered, with certain revisions, by the United States District Court for the District of Columbia, *see US v. American Telephone and Telegraph Co.*, Civ. Nos. 74–1698 and 82–0192,—F. Supp.—, 47 Fed. Reg. 40, 392 (D.D.C. 1982), and updated information and arguments have recently been filed in our reconsideration proceeding. For the reasons set forth below, we now grant both CBI and SNET waivers of the separation requirements heretofore established for their offering of CPE and enhanced services.

I. Background

2. On April 7, 1980, the Commission adopted the *Final Decision* in *Computer II* establishing the policy and procedures for the deregulation of enhanced services[2] and customer premises equipment. As modified subsequently by the *Reconsideration Order* and the *Further Reconsideration Order*, *Computer II* requires that only basic services will continue to be regulated by the Commission, while all enhanced services were detariffed beginning January 1, 1983.

3. The *Final Decision*, as modified, also provides for the phased, or "bifurcated," deregulation of CPE. New CPE may be sold or leased only on an unregulated basis, and embedded CPE will be removed from the carriers' rate bases and detariffed in a manner to be determined in a separate Commission proceeding, CC Docket No. 81–893. *See Notice of Inquiry in Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Implementation Proceeding)*, 89 FCC 2d 694 (1980).

4. An integral part of our *Computer II* decisions is the requirement that AT&T or its affiliated carriers[3] can offer enhanced services and CPE (after a transition period) solely through a separate subsidiary.[4] We established these conditions for carriers under the

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further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom., CCIA v. FCC, 693 F. 2d 198, (D.C. Cir. 1982).

[2] "Enhanced services" are those services, offered over common carrier transmission facilities used in interstate communications, that employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Communications Act. Final Decision, 77 FCC 2d at 498.

[3] Other carriers are permitted to directly provide such services and equipment but must keep separate books of accounts for these activities. Final Decision, 77 FCC 2d at 476.

direct or indirect control of AT&T after we had completed a cost-benefit analysis based on a reasoned consideration of the following factors:

(a) a carrier's ability to engage in anti-competitive activity through control over 'bottleneck' facilities . . .;
(b) a carrier's ability to engage in cross-subsidization to the detriment of the communications ratepayer;
(c) the integrated nature of the carrier and affiliated entities, with special emphasis upon research and development and manufacturing capabilities that are used in conjunction with, or are supported by, communications derived revenues; and
(d) the carrier's possession of sufficient resources to enter the competitive market through a separate subsidiary.

Reconsideration Order, 84 FCC 2d at 72.

5. Our assessment led us to the conclusion that, on balance, the benefits of imposing structural safeguards for carriers other than AT&T did not outweigh other public interest considerations and that such requirements were currently unwarranted.[5] In contrast, we determined that for AT&T and its associated carriers, structural separation would be essential to maximizing the wellbeing of the ratepayers.

6. On February 11 and 20, 1981, Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET), respectively, filed motions for declaratory rulings with the Commission, seeking an interpretation that the structural separation requirements established in the *Second Computer Inquiry*would not apply to their operations. CBI and SNET argued that since AT&T holds only a minority interest in them, AT&T does not exercise sufficient control to warrant that they be required to offer CPE and enhanced services only through a separate subsidiary. In the alternative, each sought a waiver of structural separation requirements. Eight parties[6] opposed

[4] During the implementation phase of Computer II, we have reviewed and approved, with certain modifications, capitalization plans for AT&T's enhanced services and CPE subsidiary. Memorandum Opinion and Order, 90 FCC 2d 404 (1982), and Memorandum Opinion and Order, released November 4, 1982. We have also permitted the new unregulated subsidiary and other AT&T entities to share certain administrative services. FCC 82–549, Order released December 13, 1982. Finally, we have conditionally allowed shared installation and maintenance activities between the new subsidiary and affiliated carriers. *See, e.g.*, August 30, 1982 letter from Chief, Common Carrier Bureau to D. W. Culkin, AT&T Assistant Vice President.

[5] In the Final Decision in the Second Computer Inquiry, we stated that both AT&T and GTE should be subject to structural separation requirements for their provision of CPE and enhanced services. 77 FCC 2d at 470. In the Reconsideration Order we concluded that GTE should be excluded from this separate subsidiary resale structure. 84 FCC 2d at 72.

[6] Association of Data Processing Service Organizations, Inc. (ADAPSO), Associated Telephone Answering Exchanges, Inc. (ATAE), Computer and Business Equipment Manufacturers Association (CBEMA), Connecticut Association of Telephone

one or both motions, challenging the contentions by CBI and SNET that AT&T does not control them.

7. In an *Order*released October 20, 1981, 88 FCC 2d 33, the Commission denied the motions. At that time we found that despite the fact that AT&T held only a minority stock interest in CBI and SNET, the companies were full partners in the Bell System and subject to AT&T control. Although AT&T owned substantially less than half of the outstanding stock for either company, we determined that it was clearly the dominant shareholder in both cases. *Id.*at 39. CBI and SNET were also found to enjoy, along with the other Bell operating companies (BOCs), a special and significant contractual relationship with Bell Telephone Laboratories and Western Electric. *Id.*at 39, 43. Both also received financial advances as needed from AT&T and subscribed to AT&T corporate management plans. *Id.*Since the two were virtually indistinguishable from the rest of the BOCs, we concluded that CBI and SNET must be governed by the same *Computer II*rules that govern other Bell System members. *Id.*at 45.

8. Further, we denied both waiver requests after concluding that CBI and SNET must be viewed not in isolation, but as members of the Bell System family, which we determined, as a whole, wielded substantial market power and warranted structural separation. Like other Bell telephone companies and unlike non-Bell entities, CBI and SNET have had ready access to the substantial resources of AT&T, Western Electric, and Bell Labs.

9. On November 19, 1981, CBI and SNET petitioned for reconsideration of the October 20 *Order*. Both claim that changed circumstances warrant a waiver. CBI Petition at 2; SNET Petition at 3. They argued that AT&T had not invited them to participate in the new AT&T national separate subsidiary. In addition, it was asserted that their participation would not be in the long-range best interests of their customers and shareholders because individual opportunities would be forfeited in favor of an "infinitessimal proportion" of the AT&T subsidiary's equity. CBI Petition at 2–4; SNET Petition at 5–6. Further, SNET opined that the factors which led the Commission to its finding of AT&T control will not be present in future AT&T-SNET relationships. SNET Petition at 4–11. Both telephone companies also argued that a correct application of the four standards for determining whether structural separation should be imposed would result in the conclusion that a waiver should be granted. CBI Petition at 4–16; SNET Petition at 11–20. See Para. 4 *supra*. CBI and SNET insisted that the Commission did not and could not find that the two carriers have control over bottleneck facilities

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Answering Services, *et al.* (CATAS), MCI Telecommunications Corp. (MCI), North American Telephone Association (NATA), Southern Pacific Communications Company (SPCC), and (on reply) Independent Data Communications Manufacturers Association (IDCMA).

on a broad national geographic basis. CBI contended that the Commission has failed to determine whether CBI has the ability to engage in cross-subsidization, while SNET stressed that accounting safeguards should permit adequate regulatory controls. Both companies emphasized that their probable absence from participation in the new AT&T subsidiary because of high risks and high costs would effectively negate any advantages of integration. Finally, CBI and SNET stated that a separate subsidiary requirement would cause duplication of costs and argue that this condition is harmful to its ratepayers and stockholders. They also asserted that the requirement is unfair, given the many independents and GTE subsidiaries similarly or better situated that are free from such a constraint. Their petitions were opposed by five parties.[7]

10. On January 8, 1982, AT&T and the Department of Justice announced that they had agreed to a proposed settlement of their pending antitrust case. If sanctioned by the court, the agreement would require a significant restructuring of the Bell System and its existing interrelationships. CBI and SNET would not be divested under the terms of the recommended Modification of Final Judgment (MFJ), but would be required to terminate certain contractual arrangements.

11. Subsequently SNET filed a request for stay of the effectiveness of certain of our actions in *Computer II*. In its March 18, 1982 submission, the Bell company cited the significant changes contemplated by the proposed MFJ and urged the Commission to stay the October 20, 1981 *Order*, the pending reconsideration proceeding, and certain *Computer II*reporting requirements. 90 FCC 2d 233 (1982).

12. In its *Stay Order* released June 6, 1982, *id.*, the Commission determined that the tremendous uncertainty and the potentially profound changes to the structure of the telecommunications industry attributable to the proposed MFJ compelled a finding that a selective stay of brief duration would best serve the public interest. We found that it was demonstrably the wrong time to apply structural separation requirements to SNET and CBI[8] and to continue the reconsideration proceeding. Specifically, we stayed the affirmative obligations imposed on CBI and SNET under *Computer II* but continued to bar the two companies from offering any new enhanced services unless through fully separate subsidiaries. CBI and SNET were explicitly permitted to file a waiver request concerning the separate subsidiary condition for a particular service. *Id.* at 237.

13. If the stay remained in effect beyond January 1, 1983, the

[7] IDCMA, ADAPSO, CBEMA, ATAE, and NATA.

[8] Although the Commission was ruling on the SNET request, we also granted *sua sponte* a similar stay for CBI, whose situation closely parallels that of SNET. *Id.* at n. 3.

deadline established for AT&T and affiliated carriers to meet separation requirements for providing CPE and enhanced services, the Commission directed CBI and SNET to comply with our *Computer II* conditions applicable to non-separated telephone companies. Hence, the two BOCs would be required to keep separate books of accounts for their respective regulated and unregulated operations.[9] *Id.* at 238.

14. We also stayed the requirement imposed on CBI and SNET in *Computer II* relating to the filing of detailed administrative services sharing reports, installation and maintenance (I&M) plans, and capitalization plans. Both carriers were directed, however, to submit to the Commission within thirty days of the release date of the *Stay Order* a general description of their contingency plans in these areas. These plans were filed by SNET and CBI in a timely fashion.[10]

15. On August 24, 1982, the United States District Court for the District of Columbia approved, with certain revisions, the proposed MFJ. This consent decree required, *inter alia*, that twenty-two Bell operating companies be divested from AT&T by February 24, 1984 and that these BOCs would be restricted to the provision of local exchange and exchange access services and to new customer premises equipment.[11] AT&T, in turn, would be essentially freed from the constraints of the 1956 Consent Decree and would be able to participate in virtually any market of its choosing.[12] Under the

[9] These safeguards became operative earlier this year.

[10] "The Southern New England Telephone Company General Description of Contingency Plans for the Formation and Operation of a Fully Separate Subsidiary" and the "Cincinnati Bell Inc. General Description of Fully Separated Subsidiary Capitalization Plan Contingent Upon Imposition of Structural Requirements Developed in Second Computer Inquiry (Docket 20828)" were filed with the Commission on July 15 and July 16, 1982, respectively. CBI had already submitted its administrative sharing and I&M plans to us on January 11, 1982.

[11] AT&T has announced that it intends to implement the requisite divestiture on January 1, 1984. Hence, if sanctioned by the court, embedded CPE must be transferred from the BOCs to AT&T or sold to BOC customers or others by that date. Once divestiture occurs, however, the MFJ will permit the BOCs to provide new CPE. Under the terms of our *Computer II* decisions, the BOCs are required to offer all new CPE only through a separate subsidiary. In a proceeding instituted today, we are reviewing the question of the applicability of our structural separation conditions in view of the imminent divestiture. By our action today relating to CBI and SNET we are not prejudging the *Computer II* separation issues in the Notice of Inquiry and Proposed Rulemaking concerning the BOCs. CBI and SNET differ from the BOCs and their successor regional operating companies in terms of, *inter alia*, the requirement for divestiture from AT&T, the size and scope of operations, access to the new central staff organization which will provide service and assistance to the regions, and prior to divestiture, the existence of non-AT&T stockholders.

[12] Certain prohibitions would remain, however. For example, AT&T will be banned from engaging in electronic publishing over its own transmission facilities for a period of seven years beginning from the date of entry of the consent decree.

terms of the MFJ, AT&T's ownership interest in CBI and SNET would be unaffected, but the two BOCs' license contract and standard supply contract arrangements with AT&T and Western Electric, respectively, must be terminated no later than the date of divestiture.[13]

16. In compliance with the terms of the Commission's *Stay Order*, SNET and CBI filed supplements to their original petitions for reconsideration in this proceeding on October 7 and October 8, 1982, respectively. They argue that the MFJ will dramatically transform the telecommunications industry, both regulated and competitive, and will significantly alter their specific situations. SNET Supplement at 22; CBI Supplement at 10. Both emphasize that the MFJ directly affects them through the required termination of their license contract and standard supply contract and the dismantling of the vertically and horizontally integrated Bell System. As a result, CBI and SNET conclude that they now do not meet any of the four standards for determining the applicability of the *Computer II* structural separation requirements. Specifically, the two companies assert that (1) they will no longer be part of a national local exchange network, or "bottleneck," which will be eliminated through the divestiture of the BOCs; (2) the accounting methods being developed in the *Implementation Proceeding* as well as the need for CBI and SNET to contract with numerous unrelated organizations in the areas of exchange services and competitive offerings, will assure the Commission and ratepayers that no cross-subsidies will exist; (3) the Commission's concern about integration of local exchange services with the manufacture and distribution of CPE has been solved by the termination of the license contract and standard supply contract, and their replacement by new arrangements between CBI and SNET and a number of unrelated entities; and (4) CBI and SNET are small, geographically limited corporations which do not and will not possess market power sufficient to justify the expense of separate subsidiaries. CBI Supplement at 1–3, 5–9; SNET Supplement at 10–23. SNET also cites the court's findings in *Northeastern Telephone Company v. AT&T, et al.*, 651 F.2d 76, 96 (2d Cir. 1981) as evidence that it has not acted anticompetitively. SNET argues that it meets this standard and the other two standards (competition with AT&T and entry of new competitors) used by the Commission in waiving the structural separation requirements initially established for Telenet after it was acquired by GTE. *Id.* at 20–21.

17. SNET points out that the MFJ, when implemented, will split the Bell System into three types of entities: (1) AT&T and its remaining affiliates; (2) the divested BOCs; and (3) SNET. SNET

[13] The specific nature of the successor agreements for the license contract and standard supply contract has not yet been determined for CBI and SNET.

Supplement at 4. It asserts that the MFJ will create significantly different interests, assets, market entry possibilities, and areas of operation for these entities. *Id.* at 4–6. Further, SNET states that the primary methods of alleged AT&T control over SNET which underlay the Commission's rationale for its October 20, 1982 *Order* have been eliminated by the 1982 consent decree. The company insists that termination of the license and standard supply contracts will sever its economic integration with AT&T, Western Electric, and the divested BOCs. *Id.* at 7–10.

18. Seven parties filed comments opposing the CBI and SNET supplements to their petitions for reconsideration.[14] These parties contend that the MFJ has not fundamentally altered the Commission's finding that the two Bell telephone companies shoudl be subject to the structural separation requirements established in *Computer II*. They emphasize that except for termination of the license and standard supply contracts, the relationship of CBI and SNET with AT&T remains unaltered by the MFJ, *i.e.*, AT&T *de facto* control over the two companies is unchanged. CBEMA and IDCMA argue that the MFJ does not purport to address the basic relationship between AT&T and either CBI or SNET. CBEMA Oppositions at 2 (both submissions); IDCMA Comments at 12–14. SPCC, IDCMA, and CATAS point to the continuing AT&T ownership of CBI and SNET common stock as an area of control which remains intact. SPCC Opposition at 2; IDCMA Comments at 5–6; CATAS Memorandum at 6–7. UTCC and NATA stress that nothing in the MFJ precludes AT&T from engaging in various activities which the Commission determined to be indicia of control.[15] UTCC Comments at 9; NATA Comments at 9. IDCMA, NATA, and SPCC observe that the traditionally close relationship between AT&T and the two BOCs is likely to continue based on the agreements in principle consummated in 1982.[16] IDCMA Comments at 6–9; NATA Comments at 8–9; SPCC Opposition at 3–4. SPCC, UTCC, and CATAS indicate that notwithstanding the effects of the MFJ, accounting safeguards alone would not prevent cross-subsidization and other anti-competitive

[14] These include CATAS, ATAE, CBEMA (separate comments submitted for each movant), IDCMA, NATA, Southern Pacific Communications Company (SPCC), and United Technologies Communications Company (UTCC).

[15] Among the devices and arrangements which we found facilitates AT&T control over its carrier affiliates are: contracts generally; patent control, including patents developed by Bell System companies; control of policy and supervision of actions of operating companies, including selection of company executives, salaries, etc.; license contracts; financial advances to operating companies; and prescription of standard operating practices for the operating companies.

See Connecticut Water Company, 25 FCC 1367, 1371 (1958). *See also* 88 FCC 2d at 39.

[16] "Memorandum of Understanding Between Cincinnati Bell, Inc. and American Telephone and Telegraph Company" (April 23, 1982). "Memorandum of Understanding Between the Southern New England Telephone Company and American Telephone and Telegraph Company" (May 12, 1982).

conduct. SPCC Opposition at 4–6; UTCC Comments at 2, 6; CATAS Memorandum at 6. The latter also claims that SNET has engaged in cross-subsidization and other dubious behavior in the telephone answering market, but that even structural separation would not restrict such conduct. *Id.* CBEMA, IDCMA, NATA, and UTCC argue that CBI and SNET when viewed as part of the Bell System meet the four separation criteria even if the impact of the MFJ is included. They perceive affiliation with AT&T, rather than carrier size, as the key to determining the applicability of *Computer II* structural requirements to various telephone companies. CBEMA Oppositions at 4–7; IDCMA Comments at 10–12; NATA Comments at 10–12; UTCC Comments at 13–14. UTCC also stresses that CBI and SNET have failed to demonstrate that the waivers they seek will "better serve" the public interest as required by *Carolina Broadcasting Company*, 18 FCC 2d 482, 483–84 (1969). *Id.* at 14–16. Finally, ATAE and CATAS assert that the Commission's *Computer II* decisions should remain valid until at least the AT&T reorganization is completed. ATAE Comments at 3–4; CATAS Memorandum at 7.

19. On reply SNET and CBI deny the validity of the claims by other parties regarding AT&T's control of the two companies. SNET claims that the required termination of the license contract and the standard supply contract, as well as the voluntary termination of other arrangements between SNET and AT&T, such as AT&T funding of SNET, rotation of SNET managers to AT&T, and SNET compliance with changes in AT&T's standard operating practices will eliminate the Commission's concern with *de facto* control of SNET by AT&T. SNET Reply at 3–4. SNET also argues that it will supplant the traditional Bell arrangements with agreements between SNET and many other parties, only one of which will be AT&T. *Id.* at 5–6. CBI specifically rejects the argument that the MFJ does not appreciably change the relationship of AT&T with CBI because AT&T will continue to own about 30 percent of CBI's common shares; stock ownership is claimed to be the only facet of the CBI-AT&T relationship that will not change under the MFJ. CBI Reply at 3–5. Both CBI and SNET posit that divestiture of the BOCs will eliminate AT&T's control of a natinwide network of local exchange facilities, thereby removing the primary basis for their structural separation requirement. *Id.*; SNET Reply at 3–4. Further, the two BOCs assert that they should be treated no differently than any (independent) telephone company. SNET observes that several independents are not only larger than SNET but also have the advantage of an integrated research, development, and manufacturing capability. SNET Reply at 7. CBI underscores the "crippling inefficiency" imposed by a separate subsidiary requirement and the adequacy of accounting standards as a safeguard against undesirable cross-subsidies. CBI Reply at 6–7. CBI also stresses the tremendous financial and administrative burden imposed by structural separa-

tion that would ignore and jeopardize the interests of CBI's more than 18,000 non-AT&T stockholders as well as hinder CBI in a competitive marketplace. *Id.* at 8–9. Finally, SNET claims that CATAS' argument that SNET has engaged in anti-competitive conduct in the telephone answering market is not valid and also stands in opposition to the Commission's pro-competition policies. SNET Reply at 8.

20. The two companies conclude that they should be exempted from the structural separation requirement. CBI requests that it be relieved of the obligation to offer CPE and enhanced services only through a fully separate subsidiary. CBI Reply at 8. In turn, SNET asks that the Commission grant its motion for declaratory ruling or, alternatively, issue a waiver of the structural separation requirement. SNET Reply at 9.

II. Discussion

21. We are cognizant of the substantial impact that the new consent decree will have on the telecommunications sector as a whole and especially on AT&T and its affiliates. Given this fundamental restructuring, then, we must assess the need to require CBI and SNET to establish fully separate subsidiaries for the provision of CPE or enhanced services. To this end, we must re-examine the two broad tests embraced by the Commission in its October 20, 1981 *Order* (88 FCC 2d 33):

(1) the applicability of Computer II structural separation requirements to CBI or SNET, *i.e.*, whether or not AT&T controls the two carriers; and

(2) whether or not CBI or SNET meets the requisite standards for a waiver grant.

A. AT&T Control

22. Under traditional tests for corporate control, AT&T controls CBI and SNET. AT&T continues to hold a controlling financial interest in both companies today. The MFJ does not require, either explicitly or implicitly, that AT&T divest itself of its holdings in the two Bell companies. Although its stock ownership percentage for CBI and SNET is less than 50 percent (approximately 30 percent and 23 percent, respectively), AT&T's share of CBI and SNET common stock exceeds the combined holdings of the next 29 largest stockholders in each case. This essentially represents little or no change from the relative ownership interests in the two carriers which existed at the time we were considering their original motions in this proceeding. *See Order* at 39.

23. Although considerable uncertainty exists regarding the other indicia of control upon which we relied in making our findings in the October 20, 1981 *Order*, we are aware of the potential for additional control through these means. Hence, such traditional

practices as rotation of CBI and SNET managers to AT&T, prescription of standard operating practices for CBI and SNET by AT&T, and use of the Bell logo are not prohibited by the MFJ and may well be used to reinforce AT&T control of the two Bell companies. Two important elements of AT&T's existing control over all Bell System telephone companies, the license contract agreement and the standard supply contract, will cease to exist as a result of the MFJ and are scheduled to be terminated on January 1, 1984.[17] However, CBI and SNET entered into Memoranda of Understanding (MOUs) with AT&T in mid-1982 as an initial step toward replacing the various intrasystem arrangements which currently exist.[18] Rather than successor arrangements *per se*, each MOU contains a list of principles that are "intended to guide the development of replacement agreements providing [CBI and SNET] value equivalent to that which they are now entitled to receive under the License Contract and other agreements." SNET and CBI MOUs at 2, 3. In addition, other principles "may be added by mutual consent." *Id.* We have been informed by AT&T that

> [c]urrently, separate negotiations are underway respecting detailed agreements between CBI and SNET and the BOC or AT&T entities which after divestiture will have possession of the resources currently used by AT&T to provide License Contract and other services. It is expected that these negotiations will result in a series of agreements which will replace the existing agreements.[19]

In essence, AT&T's control—either realized or potential—over CBI and SNET appears to remain largely intact.

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[17] Although not specified in the MFJ, other BOC intra-system arrangements currently in effect, business information systems (BIS), cost sharing agreements, and a number of miscellaneous operational agreements, will also be terminated on the date of divestiture pursuant to termination agreements. *See* "AT&T Plan of Reorganization," esp. pp. 425–434, filed December 16, 1982 in the MFJ proceeding. The Division of Revenues contracts, the means by which revenues are allocated among Bell System companies to compensate them for costs incurred in providing interstate services, will also be terminated but may be in effect for some limited time beyond the divestiture deadline because of the inherent need for retroactive revenue settlements. *Id.* at 434–35. AT&T has announced its preference for retaining several existing categories of contracts (*e.g.*, leases, rights-of-way) involving the BOCs. These agreements are regarded by AT&T as not significant in scope or financial impact and allegedly do not create an economic integration inconsistent with the consent decree. *Id.* at 433–34.

[18] See n. 23. Hereafter we will refer to these documents as "CBI MOU" and "SNET MOU." These MOUs were signed by the Chairman of AT&T and the President of CBI or SNET, respectively.

[19] Letter dated November 19, 1982 from F.C. Minter, AT&T Assistant Comptroller to Chief, Common Carrier Bureau. Pursuant to Section 211(b) of the Communications Act, as amended, we direct CBI and SNET to file with the Commission copies of the new contracts that will result from these MOUs and ongoing negotiations.

B. The Waiver Issue

24. Thus, the fundamental question to be addressed in evaluating the reconsideration petitions submitted by CBI and SNET is whether circumstances have substantially changed since the findings made in the October 20, 1981 *Order*. In our consideration of the original CBI and SNET petitions for waiver, we required that they show good cause for the requested departure from our rules. 88 FCC 2d at 42. We used a "hard look" standard, analyzing on a cost-benefit basis the applicability of a separate subsidiary condition to CBI and SNET, and concluded that, as members of the Bell System, they should be subject to the same structural safeguards as the other Bell telephone companies. *Id.* at 43. As affiliates of AT&T, CBI and SNET were found to meet the four criteria established in our decisions in *Computer II*. *See* para. 4 *supra*.

25. Our denial of the CBI and SNET waiver petitions predates both the proposed AT&T-Justice Department settlement of pending antitrust litigation and the entry of the MFJ. The implementation of the MFJ will clearly cause profound changes to the current market structure of the telecommunications industry. It is this occurrence on which the petitioners principally base their arguments for reconsideration of our previous decision to require structural safeguards for CBI and SNET, see paras. 9, 18, 19, *supra*, and it is to these new circumstances we now turn.

26. In brief, we believe a grant of the waiver requests submitted by SNET and CBI is consistent with the public interest. Our initial findings in the *Order* were based on the existence of the world's largest vertically integrated telephone system. The AT&T corporate family at that time consisted of, *inter alia*, (1) the parent, composed of a mammoth headquarters operation providing financial, technical, and legal advice and assistance to "in-house" telephone companies (the General Department) as well as the nation's dominant provider of long distance telephone service (Long Lines); (2) twenty-four Bell System Operating Companies that furnished some 80% of local telephone service in the United States; (3) the 22d largest manufacturing firm based in this country (Western Electric)[20]; and (4) an affiliated research laboratory widely regarded as one of the preeminent R & D facilities in the world (Bell Telephone Laboratories). As we noted in the *Final Decision* in *Computer II* (84 FCC 2d at 74):

> There is no dispute in the record as to the relative size of AT&T compared to the independent telephone companies. We believe this disparity in size leads to the result that the benefits of structural separation for AT&T are greater than the costs, while this calculus is reversed for the independent telephone

[20] "Fortune 500" Survey, May 3, 1982 *Fortune*, p. 260.

companies. In addition, AT&T has enormous research and development and manufacturing capabilities, which greatly complicates assessing allegations of cross-subsidy.

27. As a result of the MFJ approved by the court on August 24, 1982, however, CBI and SNET will no longer be an essential part in AT&T's control over our nationwide local exchange facilities.[21] Divestiture of twenty-two Bell operating companies on January 1, 1984 pursuant to the terms of the MFJ will effectively separate CBI and SNET from the traditional integration of Bell System local exchange facilities.

28. Earlier we concluded that (88 FCC 2d at 43):

> [W]e cannot view CBI and SNET in isolation, as they would have us do. We have already noted that both are under the control of AT&T. The relative size of the AT&T corporate family and the diverse national markets the family serves give each member of the Bell System market power which is disproportionate to its firm or market size.

29. At the present time, the structural requirements of *Computer II* can be viewed as applying to three different types of entities: (1) AT&T as a regulated provider of interexchange service and a provider of CPE; (2) the as yet undivested BOCs; and (3) CBI and SNET. In examining the appropriateness of the application of structural separation to these two telephone companies, we note that, viewed in light of the changed world of telecommunications they have neither the control of an overwhelming majority of the nation's bottleneck facilities which has been enjoyed by the unified Bell System,[22] nor the control of a significant percentage of the nation's interexchange facilities as both was the case with the Bell System and will be the case with AT&T's control of inter-LATA facilities.

30. Viewed in this light, the companies, in fact, fail to meet the necessary standards for structural separation. Neither possesses sufficient size nor market dominance in a significantly large regional area to warrant imposition of a separate subsidiary requirement. For example, SNET and especially CBI pale in terms of market presence relative to the exempt GTE telephone companies. Clearly neither SNET nor CBI can be said to have the ability to draw upon a broad-based national network of local exchanges if they intended to engage in anti-competitive behavior. We also have not been persuaded that the benefits of outweigh the costs of requiring a separate subsidiary.

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[21] Nor will CBI or SNET be part of any new "regional operating company" formed as a result of the MFJ. The applicability of our *Computer II* structural separation conditions to the divested companies presents different issues. *See* n.11, *supra*.

[22] Indeed, we note that the percentage of the nation's bottleneck facilities controlled by CBI or SNET is quite small even when compared to a post-divestiture regional Bell company.

With respect to local offerings, neither CBI nor SNET possesses a market dominance which differs from that enjoyed by many large independent telephone companies. The continuation of the separate subsidiary requirement with respect to AT&T will provide adequate protection in connection with national offerings by either CBI or SNET. Moreover, any such offerings are likely to be made in competition with American Bell. Such findings prevent us from affirming our prior conclusions concerning the applicability of the *Computer II* structural requirements for CBI or SNET.

31. Thus, with the imminent split-up of the AT&T family, we must recognize that AT&T's affiliated local exchange carriers will be reduced from 24 companies serving a broad national geographic area to two entities, CBI and SNET, operating in much smaller regions of the country.[23] In addition, certain incentives previously lacking should favorably impact CBI, SNET, and AT&T from the ratepayers' perspective. With the changes brought about by the MFJ and the recent Commission actions and policies favoring the growth of competition, we anticipate that the two telephone companies will compete with AT&T's wholly-owned American Bell Inc. (ABI) at least in their respective service areas. The prospects for such competition have already been boosted by the announcement that AT&T will use the national distribution system of Sears, Roebuck and Company to market Bell CPE.[24] In addition, SNET has recently announced that it will enter the telecommunications equipment market outside of the State of Connecticut. Further, SNET and (impliedly) CBI have indicated that they expect to compete directly with AT&T in the CPE market.[25] SNET Reply at 5; CBI Supplement at 8. This intention has been indicated with regard to enhanced services as well. *Id.* Indeed, *Computer II* and terms of the MFJ will require the two Bell companies to offer basic "pipeline" transmission service to AT&T and anyone else pursuant to tariff, with equal charges for equal interconnection, on a nondiscriminatory basis just as CBI and SNET will in many cases be required to take inter-LATA transmission capacity from AT&T or other inter-LATA carriers.

III. *Conclusion*

32. The telecommunications industry is currently undergoing

[23] *See* n. 26 *infra*.

[24] During the fourth quarter of 1982 Sears began retailing customer premises equipment on a trial basis pursuant to an agreement reached with AT&T earlier that year.

[25] In their MOUs with AT&T, CBI and SNET contemplate that under the replacement contracts, they will act as an ABI agent and/or distributor for new CPE and services. They also have indicated that they expect to sign or - in some cases - have already signed agreements with non-Bell suppliers of equipment and research services. These companies include Mitel, GTE, ITT, Northern Telecom and Bell Northern Research.

fundamental changes in its structure as a result of the 1982 Modification of Final Judgment terminating the Justice Department's 1974 antitrust suit against AT&T. With this restructuring of the Bell System has come the need to reexamine, *inter alia*, the applicability of *Computer II* separate subsidiary requirements to its current members. In this proceeding reconsidering our October 20, 1981 *Order*, we have focused on the relationship of CBI and SNET to AT&T and the desirability of imposing structural separation on the two Bell operating companies in light of the new environment. We have concluded that as a result of the changed circumstances created by the MFJ, there is no longer a need to require CBI and SNET to establish fully separate subsidiaries for their provision of customer premises equipment and enhanced services. While AT&T continues to control these companies through at least its ownership interests, the imminent dissolution of AT&T's national bottleneck of local exchanges compels us to view CBI and SNET as the sole remaining entities of that network in the near future. Viewed from this perspective, we find that the two BOCs possess insufficient market dominance to warrant such structural conditions. Hence, we conclude that sufficient federal interest does not dictate the imposition of a separate subsidiary requirement. Upon reconsideration we grant the requests for waiver sought by Cincinnati Bell Inc. and Southern New England Telephone Company.

33. Our findings are predicated on the new telecommunications environment that, we expect, will be created by implementation of the MFJ. Changed circumstances or specific evidence of abuse, of course, could cause us to reassess our conclusions today. For example, failure to divest the twenty-two Bell Operating Companies could negate many of our findings and would necessitate a reexamination of the need for structural separation for CBI and SNET. We intend to monitor the implementation of the consent decree in the coming months in order to keep abreast of any such developments.[26]

[26] We are aware that divestiture will likely not occur until January 1, 1984 and that the broad-based AT&T bottleneck control will continue until that time. Rolm Corporation in comments filed in this proceeding on February 9, 1983 insists that SNET through its new unregulated subsidiary, SONECOR, has preempted competitive bidding by Rolm and others by offering both Bell (Western Electric) and non-Bell multi-line CPE at below cost, noncompensatory prices. Rolm argues that the pending stay on the *Computer II* structural separation requirements for SNET be terminated and that such separation be specifically imposed on SNET "so long as it maintains all of its affiliations with AT&T and the Bell System" (pp. 6–7). In the alternative, it is asserted, the Commission should commence evidentiary proceedings in which the anticompetitive abuses may be demonstrated. We are, of course, concerned about any allegations of abuse but to date have received no evidence regarding Rolm's claims. *See* Telocator Network of America v. FCC, No. 78–2218, D.C. Circuit decided October 5, 1982. Absent concrete evidence of significant marketplace abuses, it would appear that the costs of requiring CBI and SNET to establish separate subidiaries for provision of

IV. Ordering Clauses

34. Accordingly, IT IS ORDERED, That the petitions for reconsideration and the supplements thereto filed by Cincinnati Bell Inc. and Southern New England Telephone Company relating to this Commission's Memorandum Opinion and Order released October 20, 1981, 88 FCC 2d 33, ARE GRANTED TO THE EXTENT SET FORTH IN THIS ORDER and ARE OTHERWISE DENIED.

35. IT IS FURTHER ORDERED, That the Stay of the Commission's previous decision in this proceeding, released June 16, 1982, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

CPE and enhanced services would greatly outweigh any attending benefits of mitigating the potential for abuse through such a structural remedy.

Application for Review
Call Letters, Assignment

Application for review denied and staff action affirmed. In resolving questions concerning the likelihood of public confusion arising from similar call signs, the controlling question is simply whether the letters in two call signs, apart or in combination, would sound sufficiently alike to the average listener, so that the listener would confuse one station for another.
–*Classical B/cing Society of San Antonio, Inc.*

FCC 83–52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Matter of

CLASSICAL BROADCASTING SOCIETY OF SAN ANTONIO. INC.
San Antonio, Texas

For Assignment of the Call Letters KPAC to a New Noncommercial Educational FM Radio Station

MEMORANDUM OPINION AND ORDER

(Adopted: February 1, 1983; Released: February 4, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned application; (b) an objection thereto dated May 24, 1982, by KISS Broadcasting, Inc., licensee of AM radio Station KMAC, San Antonio, Texas; (c) the staff action of June 29, 1982, denying the objection; and (d) an application for review filed July 8, 1982, by KISS Broadcasting directed against that staff action.

2. The applicable standard in this case is that stations may request call letters of their choice, excepting the initial letter, if the desired call letters are available, are in good taste, and are sufficiently dissimilar phonetically and rhythmically from the existing call letters of stations in the same service area, so that there will be no significant likelihood of public confusion. *John Poole Broadcasting Co., Inc.*, 25 RR 335 (1963). Section 73.3550(j) of the Commission's Rules embodies this principle. Applying the principle to this case, the staff concluded that there is sufficient dissimilarity between the call letters KPAC and KMAC to obviate a significant

likelihood of public confusion and denied KISS Broadcasting's objection.

3. In its application for review, KISS Broadcasting contends that the staff action conflicts with the Commission's decision in *Salem Media Corp.*, 48 RR 2d 996 (1980), and the Bureau's ruling in *Etowah Broadcasters, Inc.*, Ref. 8840-RH (Broadcast Bureau, July 29, 1974).[1] We have considered these past precedents, and we agree that the fact situation in the instant proceeding is similar. Nonetheless, the controlling factor in resolving the matter now before us is the particular call letters involved. *See John Poole Broadcasting Co., Inc.*, *supra* at 337.

4. After careful consideration of this matter, we feel that, although three letters are common to the call signs KMAC and KPAC, the differences between "M" and "P" are, in this instance, sufficient to dispel a significant likelihood of public confusion. Furthermore, Commission records do not reveal, and the staff has no recollection of any instances of actual public confusion arising out of call letter assignments of comparable similarity.[2] In light of this, we are inclined to believe that, to the extent that the test for likelihood of public confusion arising from similar call signs has been construed as involving quasi-scientific or expert judgment, it exalts form over substance.[3] The controlling question is simply whether the letters in two call signs, apart or in combination, would sound sufficiently alike to the average listener so that a listener would confuse one station for another. In this case, we agree with the staff that the *P* and *M* in KPAC and KMAC sound so dissimilar that the stations are very unlikely to be mistaken for one another by members of the public.

5. Finally, we have carefully reviewed the *Salem* and *Etowah* cases (*see* paragraph 3 and footnote 1, *supra*). To the extent that the results of those cases suggest an analysis inconsistent with that described in the preceding paragraph, we are overruling them. Until

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[1] In *Salem Media*, we denied an application for review and affirmed a staff action refusing to assign the call letters WMNY to a New York City AM station, thereby sustaining the objection by the licensee of FM Station WYNY, New York. In *Etowah*, the Broadcast Bureau denied a request by an FM station in Gadsden, Alabama, for assignment of the call letters WKNG, sustaining the objections of the licensee of AM Station WDNG, Anniston, Alabama.

[2] One example that is especially relevant to the present controversy is the coexistence in Los Angeles of AM Station KLAC and AM and FM Stations KFAC. To our knowledge, there have been no instances of public confusion as a result of the similarities between the call letters of these stations.

[3] In the early days of the development of broadcast stations, this Commission may have been properly concerned with protecting one station from possibly trading on another's good will, by adopting similar call letters. However, today broadcast is a mature and healthily competitive industry, and there is less need for protectionist rules. Indeed, we presently shall consider initiating a rulemaking looking into the current usefulness of our call letter assignment policies.

we have concluded our forthcoming rulemaking on call sign assignments, we shall apply the common sense test for public confusion described above.

6. Accordingly, IT IS ORDERED, That the aforementioned application for review IS DENIED and the staff action of June 29, 1982, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Common Carrier, Authorization
Common Carrier, Rates, Charges
Competition, Common Carriers
Reconsideration, Petition for, Denial of

Petitions for reconsideration of *Second Report and Order*, 91 FCC 2d 59, denied. FCC authority to forbear imposing requirements of Section 203 and 214 of the Communications Act upon resellers of basic domestic terrestrial common carrier services affirmed.
–*Common Carrier Services*
CC Docket No. 79–252

FCC 83–69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor	CC Docket No. 79–252

ORDER ON RECONSIDERATION

(Adopted: February 17, 1983; Released: March 21, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

1. Before the Commission are three petitions for reconsideration of our *Second Report and Order* (*Second Report*) in the above proceeding.[1] There, we concluded that we have the discretion to

[1] 91 FCC 2d 59 (1982), 47 F.R. 37889 (August 27, 1982). Petitions have been filed by American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI), and the Association of Long Distance Telephone Companies (ALTEL). Oppositions or comments have also been filed by the following parties: MCI; ALTEL; Satelco Incorporated, Tel Systems Management Corporation and Teltec Saving Communications Co. (Joint Resellers); GTE Telenet Communications Corporation (Telenet); U.S. Telephone Communications, Inc. (U.S. Tel); Satellite Business Systems (SBS); Holiday Inns, Inc. (Holiday Inns); American Hotel & Motel Association, New York State Hotel & Motel Association, Inc. and

forbear imposing traditional Title II regulation[2] in instances where such action furthers statutory purposes and the public interest. *Second Report* at para. 5. As a first step in exercising this discretion the *Second Report* relieved resellers of basic domestic terrestrial communications services[3] of the obligations to file tariffs and to obtain authority to provide or discontinue services under Sections 203 and 214 of the Act, respectively. For reasons to be explained, we conclude that the instant petitions fail to raise matters which warrant reconsideration of our *Second Report* and therefore deny them in their entirety.

I. Background

2. The history and purpose of this proceeding is set forth in detail in the *Second Report* and need not be repeated here. For present purposes, it is sufficient to recount that this proceeding seeks to update our regulatory scheme in light of the significant changes occurring in the telecommunications industry, especially the emergence of a more competitive marketplace. Thus, in our *First Report*, *supra* n. 3, we established a two-tiered regulatory framework. Under this approach, those carriers found to possess market power, *i.e.*, power to control price in the marketplace, are classified as dominant and continue to be subject to the full panoply of tariff and licensing regulation to ensure that they do not exploit their dominance to the detriment of the public. On the other hand, carriers lacking market power are classified as non-dominant, and the regulatory requirements imposed upon them have been streamlined or eliminated. Although the *First Report* was a significant initial step in modifying our regulatory processes to better reflect the realities of the industry, we recognized that more fundamental regulatory reforms were necessary to enhance the Commission's pro-competitive policies and further the public interest. Therefore, we issued a *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) (*Further*

Hotel Association of New York City, Inc. (Hotel Associations); Association of Data Processing Service Organizations, Inc. (ADAPSO); International Business Machines Corporation (IBM); Computer and Business Equipment Manufacturers Association (CBEMA); Independent Data Communications Manufacturers Association (IDCMA); TDX Systems, Inc. (TDX); Henry Geller; and Western Union International, Inc. (WUI). AT&T, MCI and U.S. Telephone and Telegraph Corporation (UST&T) have filed replies.

[2] As noted in n. 3 of the Second Report, traditional Title II regulation means control over price, publication of terms and conditions of service, control over investments and the obligation to serve all. *See generally* Sections 201–203 and 214 of the Communications Act (the Act), 47 U.S.C. §§201–203 and 214.

[3] As defined in the Second Report, resellers are those carriers which do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes. Such carriers were already classified as non-dominant in our First Report and Order in this proceeding, 85 FCC 2d 1 (1980) (First Report). The Second Report did not affect the regulatory status of resellers of domestic satellite services which are currently classified as dominant. *See* Second Report at n. 6.

Notice), in which, after a comprehensive and detailed discussion of the economic, legal and other factors involved, we determined that we were not required to apply traditional Title II regulation to all carriers providing basic communications service.

Thus, we proposed to remove regulatory requirements where the imposition of a comprehensive Title II regulatory scheme on carriers without market power was counterproductive to the advancement of the objectives of the Act, advancing two alternative approaches for doing so. Under the first, we tentatively concluded that for communications suppliers with little or no market power, the imposition of common carrier status and accordingly, the imposition of Title II regulation, was inappropriate. In the second, we asserted discretion to forbear imposing Title II requirements in whole or in part upon common carriers in instances where the costs of such regulation outweighed any perceivable benefits.

3. As explained, the *Second Report* followed this latter approach and affirmed our tentative conclusion that we possess discretionary "forbearance" authority. Moreover, we chose initially to confine our exercise of forbearance discretion to resellers of basic domestic terrestial services for several reasons. For one thing, our experience had shown little public need for regulation of resellers. We pointed out that rarely, if ever, had we had the occasion to reject or suspend and investigate tariff filings of resellers or to deny and/or condition reseller applications for facilities certification. Thus, the costs imposed by such regulation appeared to weigh especially heavily on these carriers, resulting in the unwarranted delay of new services and marketing strategies. In addition, we perceived the recent profusion of entities seeking to resell MTS/WATS services and the fact that the commenting parties for the most part agreed that regulation of resellers should be minimized or eliminated to be further indications that resellers could be deregulated separately and without further delay. *See Second Report* at paras. 5–7. Accordingly, we stated that rather than relying on tariff regulation, competitive market forces and the complaint process of Section 208 of the Act[4] would be sufficient to ensure that resellers' rates are reasonable and not unjustly discriminatory. We also found that the entry and exit requirements of Section 214 failed to serve any public policy when applied to resellers that would not be better served by competitive market forces.

II. Contentions

4. As an initial matter, MCI asserts that the Commission lacks the authority to forbear applying Title II rate and entry/exit regulation to resellers. In support, it cites the Supreme Court's decision in *Federal Power Commission v. Texaco*, 417 U.S. 380 (1974)

[4] 47 U.S.C. §208.

and the decisions of the U.S. Court of Appeals for the Second Circuit in *American Telephone and Telegraph Company v. FCC*, 572 F.2d 17, 25 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (Resale and Shared Use) and *American Telephone and Telegraph Company v. FCC*, 487 F.2d 864, 872–81 (2d Cir. 1973) (Special Permission). Moreover, noting that the Commission envisions the use of creative contract arrangements to satisfy customer needs,[5] MCI argues that such carrier-customer contracts are not provided for in the Act.[6] According to MCI, the only statutorily-sanctioned methods of operation are by tariffs and carrier-to-carrier contracts. Indeed, MCI continues, these methods are the only means for the Commission to ensure compliance with Sections 201 and 202 of the Act.[7] Thus, MCI contends that the complaint process will be ineffective in ensuring compliance with Sections 201–202 since customers will be unable to examine resellers' tariffs to ascertain the rates charged to other customers.

5. MCI also contends that our forbearance from regulation of resellers is contrary to sound public policy. Without tariffs, Section 214 authorizations and intercarrier contracts, MCI maintains that the Commission cannot determine if resale carriers possess adequate qualifications to be Commission licensees and that they comply with the other provisions of the Act. As an alternative to forbearance, MCI proposes a regulatory scheme whereby resellers would be required to obtain an initial Section 214 authorization but then permitted to expand service without further authorizations and to file tariffs to be effective on one day's notice.

6. ALTEL, a resellers trade association, challenges our findings that the costs and burdens of the tariff filing and Section 214 certification processes on non-dominant resale carriers outweigh the public benefits derived. Rather, according to ALTEL, the Section 214 process is affordable, as evidenced by the large number of such applications filed by resellers. It is also said to serve as a valuable informational process by facilitating contact and dealings within the telecommunications industry and between the industry and the public. Furthermore, ALTEL asserts that tariff filing requirements promote efficiency in managing carrier-customer relationships by obviating the necessity for resale carriers to develop, maintain and modify separate contracts with each customer. However, should the Commission affirm its decision to forbear from regulating resellers,

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[5] *See* Second Report at para. 24.

[6] In support, MCI cites Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *recon. denied*, 423 U.S. 886 (1975) and American Broadcasting Companies, Inc. v. FCC, 643 F. 2d 818 (D.C. Cir. 1980).

[7] Section 201 basically requires common carriers to furnish service upon reasonable request under charges, practices, classifications and regulations that are just and reasonable. Section 202 makes unlawful any unjust or unreasonable discrimination in charges, practices, classifications, facilities or services for or in connection with communications service.

ALTEL requests, at the very least, that the Commission allow existing certificated resale carriers to continue operating under Sections 203 and 214 for a transition period extending through the implementation of the AT&T restructuring pursuant to the Modified Final Judgment (MFJ) in the AT&T Consent Decree proceeding, *U.S. v. American Telephone and Telegraph Co.*, Civ. Nos. 74–1698 and 82–0192, —F. Supp.—, 47 Fed. Reg. 40,392 (D.D.C. 1982).

7. Additionally, ALTEL claims that the *Second Report* fails to define clearly which resale entities are deregulated and moreover, that it ignores the Commission's own decision in the *Second Computer Inquiry (Computer II)* [8] by theoretically broadening the category of resale services within our Title II jurisdiction to include enhanced resale services. Accordingly, ALTEL requests a ruling that certain services and functions[9] are enhanced or private in nature and thus not subject to Title II regulation.[10]

8. For its part, AT&T challenges the *Second Report* only in so far as we declined to forbear regulating reseller entities established by dominant carriers.[11] It claims that this exemption is arbitrary and capricious because no discussion of the factors supporting it were set forth in our opinion. In fact, according to AT&T, the reasons advanced in our *Second Report* to justify forbearance from regulation of resellers should apply equally to resale entities established by dominant carriers. At the very least, if we affirm our decision to continue tariff and facilities regulation of reseller entities established by dominant carriers, AT&T maintains that we should exempt from that policy American Bell, Inc. (ABI), its separate subsidiary formed to provide enhanced services and customer premises equipment (CPE) in accordance with *Computer II.* In support, AT&T asserts that the separation requirements imposed upon ABI by *Computer II* [12] exempt that entity from the effects of any policy issues regarding the resale of basic services by the subsidiary of a

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[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[9] *E.g.* teleconferencing or message storage and retrieval, authorization codes, discounted rates to key cities, call detail reports, offering service to a limited customer base, and network managers and sharing groups. *See* ALTEL Petition at 17–21.

[10] ALTEL also asks that we refrain from further deregulation until the implementation of the MFJ because of uncertainties regarding the MFJ's impact. ALTEL further asserts that other issues affecting resellers, such as application of Exchange Network for Interstate Access (ENFIA) charges to resellers and preemption of intrastate entry barriers and tariff restrictions on resale and shared use, warrant immediate consideration.

[11] *See* Second Report at n. 37. Dominant carriers were listed in n. 2 of the Second Report.

[12] *See* 77 FCC 2d at 475–86.

dominant carrier. Moreover, it contends that this result will assure fair competition by ABI as a resale carrier.

III. Discussion

9. For the most part, the petitioners simply repeat arguments we have already addressed in detail in our previous decisions in this proceeding. For example, MCI's challenge to our authority under the Act to forbear relies on legal precedent which we have fully demonstrated to be inapposite and on policy considerations which are irrelevant to the present communications marketplace. *See* 84 FCC 2d at 472–484 and 488–496 (*Further Notice*), and the *Second Report* at paras. 11–29 and especially n. 34. In these circumstances, further discussion of these issues is unnecessary.[13]

10. In addition, MCI and ALTEL have failed to convince us that the reasoning behind our findings and conclusions as to the deregulation of resellers is flawed. As we previously stated at para. 21 of the *Second Report*, we believe that competitive forces in the marketplace will ensure that resellers do not engage in practices violating Sections 201 and 202 of the Act. Our experience fully bears out this conclusion, since instances of such conduct by resellers have not come to our attention. Further, the complaint process of Section 208 remains available if market aberrations should occur, although no complaints have been filed since we adopted the *Second Report* last August. We recognize, of course, that some types of conduct proscribed by the Act could be more difficult to detect without a tariff filing requirement. However, given the small likelihood that such practices will occur, this appears to be a small risk when compared to the public interest gains that are likely to be achieved. Furthermore, ALTEL's arguments that tariffs promote efficiency in

[13] After the release of the Second Report, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in Computer II. Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982). In its reply pleading, MCI claims that this opinion lends further support to its view that we are without the authority to forbear from exercising Title II regulation over resellers, since although the court affirmed our discretionary authority to forbear, it limited such exercise to unique circumstances. We find no merit in this contention. While it is true that the Court's opinion recognized that the Commission does not have "unfettered discretion to regulate or not regulate common carrier services," (slip op. at 29), it also went on to find that the Commission has some leeway to decide what regulatory tools to use in regulating common carrier services. *Id.* at 28. Plainly, our action here comes well within the parameters set by the Court. The Commission in this case has recognized that the underlying carrier from whom the reseller obtains transmission capacity would remain subject to regulation and that this would serve to constrain the ability of resellers to fix unreasonably high rates. Second Report at para. 21. Moreover, we have specifically reserved both the complaint process under Section 208 of the Act and our power to reimpose certification and tariffing requirements should the need arise. *Id.* at 23. For these reasons, we do not agree that the Court's opinion compels a different result.

managing carrier-customer relationships and that the Section 214 process generates valuable information for the industry miss the point. Rate and facility regulation is not designed to convenience carriers, but rather, in the main is to police unreasonable prices or discrimination and to ensure against imprudent investments by carriers. Where, as here, we have found little likelihood exists for carrier abuse of the protections afforded the public by the Act, regulation is superfluous. Thus, even if we were to assume that the costs of these regulatory requirements are minimal, as ALTEL contends, where those costs exceed any benefits derived, we have the duty to assess the continued effectiveness of those regulations in furtherance of the public interest and the Act's objectives and to act accordingly. *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979). We expect that lifting of unnecessary tariff and facilities regulatory requirements will produce the considerable benefits noted in the *Second Report* that are clearly within the public interest and are consistent with the Act's objectives. *See*, for example, para. 29 of the *Second Report*. Accordingly, we will continue to follow the implementation principles set forth in paras. 30–32 of the *Second Report*. Specifically, no additional Section 214 applications will be processed, and resellers are given permission to cancel their tariffs on five days notice. We have not ordered resellers to remove their tariffs by a date certain, so that where necessary they may effect a gradual transition from the tariff regime.[14]

11. This brings us to the matter of continued tariff and facilities regulation of resale entities established by dominant carriers. To repeat, our decision to deregulate resellers was based on our finding that resellers do not possess any market power and accordingly, that imposition of certain Title II requirements did not further the objectives of Section 1 of the Act.[15] However, because we had not fully analyzed and resolved the issue of whether the market power of a dominant carrier may be imputed to a subsidiary engaged in the resale of its parent's basic service, we limited the scope of our forbearance policy pending further consideration.[16] This analysis is

[14] We will deny ALTEL's request that we rule as to the enhanced or private nature of various resale services and functions. As many of the parties opposing ALTEL's petition have noted, the distinctions requested by ALTEL are beyond the scope of this proceeding and a sufficient record has not been developed here on which to base adequate findings as to these matters. Furthermore, in n. 8 of the *Second Report*, we noted that enhanced services built on the transmission services obtained from underlying carriers are not subject to Title II jurisdiction.

[15] 47 U.S.C. §151.

[16] The majority of those commenting on the petitions here, if anything, underscore some of the complexities inherent in this issue. For example, MCI, U.S. Tel., ADAPSO, IDCMA, Joint Resellers, CBEMA, and Telenet, in opposing AT&T's petition, assert that the resale subsidiary of a dominant carrier would possess sufficient market power to engage in predatory pricing or to forestall competition through delays in service, thereby thwarting the power of the marketplace to ensure a reasonable relationship between rates and actual costs. Many also

continuing, and we intend to consider further deregulatory actions in future orders. Stated another way, the *Second Report* was not intended to be the last word on this subject and by no means forecloses the exercise of our forbearance authority as to this class of resellers in the future. Rather, our decision reflects this Commission's step-by-step approach to deregulation. Consequently, while we reject AT&T's argument that our decision to continue tariff and facilities regulation, for the time being, of resellers established by dominant carriers is arbitrary and capricious, we will be prepared to deal expeditiously with the generic issue. Hence, we will also deny AT&T's request that we exempt ABI from the forbearance policy of the *Second Report*. As basic policy issues surrounding AT&T's request have yet to be resolved, we believe that a decision on such a request should be made as part of a more comprehensive determination.[17] However, we are aware that some resale entities provide service for the most part outside of the serving areas of the independent telephone companies with which they are affiliated. In these circumstances, we anticipate looking favorably on requests for waivers of the tariff filing and facilities authorization requirements in our rules.[18]

12. As a result of our findings in Phase 2 of the MTS-WATS Market Structure Inquiry, *Second Report and Order in Docket No. 78–72*, FCC 82–515, released November 30, 1982, and our decision there adopting an open entry policy for service to Alaska, we conclude that all of the policies adopted so far in Docket No. 79–252 shall immediately apply to carriers serving Alaska, including forbearance for certain resellers as to tariff and facilities regulation under sections 203 and 214 of the Act. Accordingly, Alascom, Inc. and the Alaskan exchange carriers are now obligated to provide interconnection, upon appropriate request, even to carriers who no longer are required to obtain Section 214 authorizations. As a separate matter, in the *First Report*, *supra* n.3, we also excluded Hawaii, Puerto Rico, and the U.S. Virgin Islands, as well as other offshore points, from this proceeding because of possible policy, legal, economic, or facility program considerations unique to these areas. *See First Report* at n.95 and at paras. 132–34. However, under our

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question the presence of real competition between an underlying dominant carrier and its resale subsidiary and argue that the dominant carrier could restrict competition by designing and/or pricing service offerings specifically for its subsidiary. By contrast, Henry Geller and IBM support AT&T's position on the theory that the Commission should not affect the degree of competition in the marketplace by forbidding AT&T to engage in resale through a subsidiary.

[17] As part of this determination, we expect to consider whether forbearance may expand the nature of services ABI is authorized to provide. *See* Computer II, 77 FCC 2d at 474 (para. 231).

[18] In this regard, we note that the decision not to forbear presently as to resale entities of dominant carriers applies to entities affiliated with, as well as subsidiaries of, dominant carriers.

interpretation of the Record Carrier Competition Act of 1981 (47 U.S.C. §222), all of the States, Territories, and possessions of the United States, and the District of Columbia, are considered domestic points. *See Puerto Rico Communications Authority*, FCC 83–28, released February 8, 1983, at paras., 22–25. Upon further reflection, we see no reason why the policies adopted in this proceeding should not also extend to carriers providing service to all other domestic points outside the continental United States besides Alaska. However, we would like to develop a record on this issue, and therefore, we are delegating authority to the Common Carrier Bureau to solicit public comments.

13. Accordingly, IT IS ORDERED, That the petitions for reconsideration filed by American Telephone and Telegraph Company, MCI Telecommunications Corporation and the Association of Long Distance Telephone Companies ARE DENIED.

14. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is delegated the authority to solicit comments and issue a final order as to the application of the policies in Docket No. 79–252 to domestic points outside the continental United States.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Statement
of
FCC Commissioner James H. Quello
Concurring in Part

In re: CC Docket No. 79–252, Competitive Carrier Rulemaking Proceeding

I agree with the majority that this is not the vehicle for dealing with the question of forbearance regarding "dominant" resellers. However, I believe this significant issue must be dealt with and soon. Having received assurances from the staff that we will move ahead expeditiously to resolve this issue, I am satisfied that in denying AT&T's petition we are not signaling that the issue of resale of service by independent carriers and American Bell, Inc. will be shoved aside for a prolonged period of time.

Therefore, with staff assurances of reasonable expedition, I concur.

Dissenting Statement
of
Commissioner Joseph R. Fogarty

In Re: Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor

I dissent to the portion of this Order which would countinance the continued regulation under Sections 203 and 214 of the Communica-

tions Act of resale entities established by independent telephone companies and AT&T.[1] Fair is fair. I find no need to restrict resale carriers controlled by telephone companies by imposing tariffing and facilities regulation on them while their competitors are free to compete in the same markets without such encumbrances. It is specious to argue that this regulation is necessary because of the parent's terrestrial dominance which is imputed to the resale subsidiary. No further analysis is required. The Commission has all the information it requires to permit telephone companies to compete fully in the resale market without burdensome waiver requirements.

Continued tariff and facilities regulation of these entities has created a number of anomalies. For example, Heins Systems, Inc. is a resale provider controlled by principals of the Heins Telephone Company of Sanford, North Carolina.[2] Although Heins Systems serves Greensboro and Raleigh, areas completely outside of the Heins Telephone Company's exchange, and is reselling the wide area telecommunications service of AT&T,[3] it is required to file tariffs under Section 203 and seek authorization under Section 214. On the other hand, its much larger competitors such as ITT and MCI are not under such regulatory strictures. Freed of the need to obtain FCC approval for every act, these resellers may respond to competitive situations much more rapidly than Heins may. It is absurd to impute whatever dominance Heins Telephone may have in its Sanford local exchange area to Heins Systems, Inc. serving the competitive Greensboro@Raleigh resale market. It is a strange type of regulation which benefits the large established competitors to the disadvantage of small new competitors.

But this is not the only anomaly. Rotelcom, a resale entity established by the Rochester Telephone Company, is presently serving the State of Hawaii, which is also served by the Hawaiian Telephone Company. Since both must file tariffs, this competition is fair. However, if Rotelcom were to seek to serve Syracuse, New York, it, like Heins Systems, would be required to file tariffs and seek authorization from the Commission, while its aggressive competitors would not.

The PACNET situation also demonstrates the absurdity of the regulation in question. PACNET Communications Corporation is a

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[1] Consistent with my Concurring Statement in the *Second Report and Order*, I continue to oppose deregulation of DOMSAT resellers which I believe to be a special case. See Concurring Statement of Commissioner Joseph R. Fogarty, *Second Report and Order*, 91 FCC 2d 59 (1982)

[2] Heins Telephone Company is a small independent company serving 31,300 telephones with telephone operating revenues of $8,091,000. *See*, Independent PhoneFacts '82.

[3] *See, Heins Systems, Inc.*, File No. W-P-C-4418 (adopted January 12, 1983, by Chief, Domestic Facilities Division, Common Carrier Bureau).

deregulated resale carrier which is a wholely owned subsidiary of INET (a Texas Corporation) which is, in turn, a wholely owned subsidiary of Cable & Wireless, North America (a Texas Corporation) which is, in turn, a wholely owned subsidiary of Cable & Wireless, PLC, the British owned telecommunications entity. Prior to deregulation, PACNET was authorized to serve thirty cities and use 100 four KHz channels.[4] Under this decision a foreign owned entity, such as PACNET can compete in this country without regulation while resale entities controlled by independent telephone companies serving less territory cannot. The Commission never intended this result.

The FCC should permit resale entities established by independent telephone companies to offer service without being subjected to onerous regulatory requirements that are not placed on their competitors. The same argument is applicable to American Bell Inc. (ABI) and to AT&T. ABI should be permitted to offer untariffed resale services. To the extent that there exists concern about the dominance of either the independent telephone companies or AT&T, this was resolved by the requirement that these companies offer basic transmission facilities to all on comparable terms.[5] Exchange carriers are unable to favor their resale entities at the expense of other resellers. Any unforseen difficulties may be resolved through the Section 208 complaint process. It is imperative that the independent telephone companies and AT&T be allowed to compete fully and fairly now in the resale market.

Separate Statement of Commissioner Mimi Weyforth Dawson

In Re: Reconsideration of Second Report and Order in the Competitive Carrier Rulemaking Proceeding

The Commission's decision to forbear from regulating non-facilities based resellers of terrestrial services (so-called pure resellers) is one that I fully support. In this order, we take another step toward meeting the overriding objective of the *Competitive Carrier Rulemaking* proceeding,[1] i.e. to encourage competition through the elimina-

[4] PACNET was authorized to serve the following cities: Agana, Guam; Atlanta, GA; Amarillo, TX; Anchorage, AK; Austin, TX; Boston, MA; Chicago, ILL; Cleveland, OH; Dallas, TX; Denver, CO; Detroit, MI; Ft. Lauderdale, FL; Honolulu, HI; Houston, TX; Kansas City, MO; Los Angeles, CA; Minneapolis, MN; New Orleans, LA; New York, NY; Oakland, CA; Oklahoma City, OK; Omaha, NE; Phoenix, AZ; Portland, OR; Salt Lake City, UT; San Antonio, TX; Santa Ana, CA; Seattle, WA; St. Louis, MO; and Washington, D.C.

[5] See *Second Computer Inquiry*, 77 FCC 2d 384 (1980).

[1] Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Further Notice of Proposed Rulemaking (IRC Further Notice), FCC 82–187 (released April 21, 1982.

tion of unnecessary and overly burdensome regulation of non-dominant common carriers.

The *Second Report and Order*, however, also demonstrates the inequities that may result from our failure to resolve in an expeditious manner the issues which remain pending in this docket. For example, it has come to the Commission's attention that several Independent Telephone Companies have begun offering resale services outside their local service areas through affiliates. These resale affiliates, which apparently cannot take advantage of the parent companies' control over local exchange facilities, are non-facilities based carriers. Nevertheless, such affiliates may not compete on an equal footing with the non-affiliated resellers encompassed by the forbearance policy adopted today. This anomalous situation results from the Commission's continued adherence to an analytical construct adopted in the *First Report and Order* whereby a carrier which is dominant in one market is considered dominant in all markets it serves, i.e. the carrier specific approach. Under this approach, Independent Telephone Companies, which were found to be dominant in their local service areas, must be treated as dominant in their provision of all basic services, including resale services.[2]

Over two years ago, the Commission recognized the static and inflexible nature of a dominant/non-dominant classification scheme based on a carrier specific approach. *Further Notice of Proposed Rulemaking*, 84 FCC 2d at 498. It therefore proposed analyzing the communication industry using a market specific approach. This approach could lead to a carrier which is dominant in one service market nevertheless being considered non-dominant in another. Although there was virtually no opposition to the proposal in comments subsequently filed, no action has yet been taken on it.

I believe it is imperative that the issues which remain pending in this docket be resolved without further delay in order that the Commission's own inaction does not work at cross purposes with its goals in the *Competitive Carrier Rulemaking* proceeding. As demonstrated by the situation described above, we must ensure that our rules keep pace with changes that are occurring in the communication market as a result of increased competition. Otherwise, the example set forth is likely to repeat itself with frequency as carriers continue to diversify their service offerings.

[2] The Commission's assurances to resale affiliates of Independent Telephone Companies that it will look favorably upon requests for waiver of the dominant carrier rules will somewhat alleviate the inequitable situation described above. Nonetheless, I believe the Commission would be remiss in its duties if it were to unnecessarily delay resolving the question whether the resale affiliates operating outside of their corporate parents' local service areas are in fact dominant carriers.

Common Carrier, International
Satellite Communications

Application for authority to provide satellite communications service to non-carriers at all U.S. international earth stations granted for public convenience and necessity.
-COMSAT

FCC 83-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
COMMUNICATIONS SATELLITE CORPORATION	File No. I-P-C-83-008
Application for authority to provide satellite communications service to non-carriers at all U.S. international earth stations	
COMMUNICATIONS SATELLITE CORPORATION	Transmittal Nos. 428 and 431
Revisions to Tariff F.C.C. No. 101	

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983; Released: February 2, 1983)

BY THE COMMISSION:

I. *Background and Filings*

1. The Commission has before it for consideration the application of the Communications Satellite Corporation (Comsat) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to implement our recent *Authorized User* decision.[1] Also before us are three "emergency" filings by RCA Global Communications, Inc. (RCA) relating to recent actions taken pursuant to delegated authority by the Chief, Common Carrier Bureau, to implement that decision. Specifically, RCA has filed (a) an application for review of a grant in File No. I-P-C-83-008 of special temporary authority to Comsat to provide basic transmission capaci-

[1] Proposed Modifications of the Commission's Authorized User Policy Concerning Access to the International Satellite Service of the Communications Satellite Corporation (Authorized User), 90 FCC 2d 1394 (1982), *appeal docketed sub nom.* RCA Global Communications, Inc. v. FCC, No. 82-1972 (D.C. Cir., filed August 20, 1982), *case consolidated with* ITT v. FCC, Nos. 79-1046 *et al.* (D.C. Cir., filed January 12, 1979).

ty directly to users at U.S. international earth stations under the same terms and conditions that it provides such capacity to authorized carriers;[2] (b) a motion to stay the effectiveness of the grant of special temporary authority to Comsat to provide direct service to non-carriers pending review of this grant of special temporary authority by the U.S. Court of Appeals for the District of Columbia;[3] and (c) an application for review of an order which denied RCA's petition to reject or suspend and investigate the proposed revisions to Comsat's Tariff F.C.C. No. 101 which implement our *Authorized User* decision.[4] Below we (a) summarize the *Authorized User* decision; (b) review Comsat's application and the Bureau's grant of special temporary authority in File No. I-P-C-83–008; (c) outline Comsat's revisions to its Tariff F.C.C. No. 101 and address the Bureau's order denying the IRCs' petitions to reject or suspend and investigate; and (d) further describe RCA's three "emergency" filings. We then analyze Comsat's application in File No. I-P-C-83–008 and the filings of RCA.

A. *Authorized User*

2. On August 19, 1982, we released a Report and Order in the *Authorized User* proceeding. In this decision we reviewed our *Authorized User* policy which had previously limited Comsat to the role of a carrier's carrier.[5] After examining comments filed by various parties, including RCA which opposed any change in the

[2] RCA's submission, filed December 29, 1982, is titled Emergency Application of RCA Global Communications, Inc. for Review. The Bureau's letter grant of special temporary authorization in File No. I-P-C-83–008 of which RCA seeks review (and a stay) was dated December 29, 1982, Mimeo No. 1596.

[3] RCA's submission, filed on December 29, 1982, is titled Emergency Motion by RCA Global Communications, Inc. for Stay Pending Review. On January 3, 1983, RCA supplemented its Motion for Stay. On January 4, 1983, ARINC submitted an Opposition to RCA's Motion for Stay. On January 6, 1983, WUI filed a Request for Stay Pending Court Review which it indicated could be treated by the Commission as an independent request for stay or as comments supporting RCA's filings. We address it as a stay motion. ARINC filed an Opposition to WUI's submission on January 13, 1983, and WUI filed a Reply on January 14, 1983. On January 25, 1983, ITT filed an Application for Review and joined in the RCA and WUI stay motions.

[4] RCA's submission, filed on December 29, 1982, is titled Emergency Application of RCA Global Communications, Inc. for Review. The Bureau's order of which RCA seeks review is Comsat, Mimeo No. 1592 (released December 29, 1982).

[5] This policy, adopted in Authorized Entities and Authorized Users, 4 FCC 2d 421 (1966), *recon. granted in part*, 6 FCC 2d 593 (1967), proscribed non-carriers from direct use of Comsat's satellite transmission facilities except in unique or exceptional circumstances. Review of the Authorized User policy was initiated by Notice of Proposed Rulemaking in Docket No. 80–170, 77 FCC 2d 535 (1980). In the Notice, the Commission tentatively concluded that changing circumstances had cast doubt on the continued validity of its 1966 Authorized User policies and solicited public comment on a specific proposal to authorize Comsat to offer international satellite communications service directly to the public.

Authorized User policies, and analyzing the competitive and economic developments and changed policy perspectives in the international communications market, we concluded that continuation of "carrier's carrier" constraints on Comsat's service was no longer warranted. 90 FCC 2d at 1415. We therefore adopted new policies which would enable Comsat to provide service directly to both carrier and non-carrier entities by (a) requiring Comsat to make its INTELSAT basic transmission facilities available on the same terms and conditions to both non-carriers and carriers; and (b) permitting Comsat, through a separate subsidiary, to enter the end-to-end service market in competition with the IRCs.[6] Comsat was ordered by the Commission to commence offering basic satellite transmission capacity to non-carriers at all United States satellite earth stations operating with the INTELSAT global satellite system. To this end, Comsat was directed to file within 60 days of the release date of the *Authorized User* decision appropriate amendments to its authorizations under Section 214 of the Communications Act and to file all necessary revisions to its Tariff F.C.C. No. 101 to implement this new policy. 90 FCC 2d at 1435.

B. *Comsat's Section 214 Application and Grant of Special Temporary Authority*

3. Pursuant to our *Authorized User* decision, Comsat filed an application under Section 214 of the Communications Act requesting authority to provide satellite communications services directly to non-carrier users. This application, File No. I-P-C-83–008, was filed on October 18, 1982, and placed on public notice on October 27, 1982. Petitions to deny, dismiss, defer or condition were filed by RCA, ITT World Communications Inc. (ITT), Western Union International, Inc. (WUI), and TRT Telecommunications Corporation (TRT). The American Telephone and Telegraph Company (AT&T) submitted comments. Opposition pleadings were submitted by Comsat and Aeronautical Radio, Inc. (ARINC). Thereafter replies were filed by RCA, ITT, WUI, TRT and AT&T.

4. In its application to provide basic transmission capacity to non-carriers at U.S. international earth stations Comsat indicates that (a) it will continue to lease the same space segment capacity from INTELSAT and utilize the same earth station capacity at U.S. international earth stations; (b) it forsees no increase in staffing; (c) it will coordinate the alignment of service between foreign and domestic earth stations on the same basis for all users, and will provide the same quality control, signal conditioning, technical coordination, monitoring, testing and maintenance activities for all users; (d) it may enter into agreements with overseas administrations, particularly where new services or facilities are involved; (e) it

[6] Authorized User, 90 FCC 2d at 1396–97.

may incur some additional advertising costs in support of its service offering to non-carriers but does not anticipate any significant change in its revenue requirements; and (f) it will maintain an account for each user and may enter into reciprocal billing arrangements with overseas administrations.

5. In opposition to Comsat's request for authority in File No. I-P-C-83–008 to provide basic transmission capacity to carriers and non-carriers on the same terms and conditions, the IRCs argue, *inter alia*, that (a) action on Comsat's application should be deferred until the Commission resolves alleged inconsistencies between the *Authorized User* and *Comsat Structure* orders;[7] (b) action on Comsat's application should be deferred until final resolution by the Commission of issues designated for inquiry relating to the future competitive relationship between Comsat and the IRCs;[8] (c) Comsat's proposed service, as reflected in its tariff, will violate CCITT recommendations on the resale of services; (d) Comsat's provision of service to users under the proposed market structure would unlawfully discriminate against carriers, result in higher rates to IRC customers, be contrary to the competitive mandate of the Communications Satellite Act and violate the antitrust laws; and (e) there is no basis in the record to grant Comsat's Section 214 application, that a grant would result in a significant revenue diversion,[9] and that an evidentiary hearing on the merits of the application is necessary. Additionally, TRT requests that certain specific conditions be imposed on any Comsat authorization to insure that Comsat provides non-carriers only those service features it now provides to the IRCs.[10] AT&T, in its

[7] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation (Comsat Structure), 90 FCC 2d 1159 (1982).

[8] Modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system, 90 FCC 2d 1458 (1982), and Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982).

[9] In support of this allegation RCA submitted a traffic and revenue diversion study. We address this study in paragraphs 15–25.

[10] TRT requests that Comsat be specifically prohibited from providing any of the following service features which it represents are currently provided by the IRCs but not by Comsat:

1. Arranging for the acquisition on behalf of the customer of connecting terrestrial circuits or terminal equipment;

2. Advising the customer on the connecting terrestrial circuits or terminal equipment that it should acquire;

3. The coordination with other carriers in the installation or restoration of end-to-end services;

4. End-to-end testing of the customer's circuitry;

5. End-to-end circuit conditioning and balancing;

6. Fault isolation other than that necessary to determine that the satellite link

comments, emphasizes that any service offered to users pursuant to our *Authorized User* decision must only be for basic transmission or transparent satellite channels and may not be for an end-to-end service. In their opposition filings Comsat and ARINC emphasize that the proposed service will not be an end-to-end offering and that the IRCs' contentions were fully considered and dismissed by the Commission in its *Authorized User* decision.

6. In their reply filings the IRCs generally reiterate their earlier pleadings. They emphasize (a) the competitive impact on their operations if Comsat is authorized to provide service to non-carriers; (b) the need to limit any Comsat direct offering to basic transmission capacity and the importance of not permitting Comsat to bootstrap or graft incidental service features onto such a service offering; and (c) alleged inconsistencies between the *Authorized User* and *Comsat Structure* orders in which the former order permits the provision of basic transmission service directly to users by Comsat's World Systems Division while the latter order requires a separate subsidiary for any competitive offering. In its reply filing AT&T states that the Commission should ensure that any activities undertaken by Comsat pursuant to the *Authorized User* decision do not deviate from or blur the basic transmission service concept.

7. By letter dated December 29, 1982, the Bureau made a *sua sponte* grant of special temporary authority to Comsat for the provision of direct service to non-carriers on the same terms and conditions that it provides service to carriers. The Bureau letter noted the positions of TRT and Comsat, and indicated that the grant of special temporary authority did not in any way prejudge Commission action on the underlying application. RCA petitions the Commission to review and summarily reverse this Bureau action or to grant its motion to stay the effectiveness of this decision taken pursuant to delegated authority. The Bureau subsequently requested Comsat to extend the effective date of its tariff to allow adequate time for Commission review of RCA's various requests.[11]

C. *Tariff Revisions and Bureau Order*

8. Also pursuant to our *Authorized User* decision, Comsat filed Transmittal Nos. 428 and 431 to revise its Tariff F.C.C. No. 101 in order to offer non-carrier entities direct access to its satellite communication facilities. These revisions are currently scheduled to

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provided by Comsat is operating in accordance with tariffed specifications; and

7. Visits to the customer's premises either in the United States or in other countries, by technical or engineering personnel in the employ of Comsat or under contract to Comsat.

[11] The tariff revisions were originally scheduled to become effective on January 16, 1983, but Comsat has deferred the effectiveness of the revisions at the request of the Bureau to permit Commission review and to provide an opportunity for judicial stay requests to be considered by the court.

become effective on March 2, 1983. RCA, ITT and TRT petitioned for rejection or suspension and investigation of these tariff revisions. Comsat and ARINC filed replies opposing the IRCs' petitions. In their filings the IRCs argued, *inter alia,* that (a) Comsat is precluded by the *Comsat Structure* order from implementing the proposed revisions except through a separate subsidiary; (b) Comsat's filing should be rejected for lack of proper cost support data as required by Section 61.38; (c) Comsat's tariff may be unreasonably discriminatory toward carriers within the meaning of Section 202(a) of the Act to the extent Comsat proposes to offer service to non-carriers at the same rates as carriers despite alleged cost differences; (d) the tariff revisions should be rejected since Comsat lacks Section 214 authority; (e) Comsat's tariff would permit the unlimited resale and shared use of international circuits in abrogation of CCITT recommendations; (f) provision of service to non-carriers by Comsat would prejudice the Commission's consideration of issues in pending proceedings; and (g) the tariff provisions would enable Comsat to engage in anticompetitive practices.

9. In an order released on December 29, 1982, the Bureau found the IRCs' arguments to be without merit and denied the IRCs' petitions to reject or suspend and investigate. In doing so, the Bureau noted that many of the arguments raised by the IRCs, especially regarding the competitive effect of Comsat's offering to non-carriers, had already been considered and rejected in the Commission's *Authorized User* decision. Thus, the tariff review process was simply not the proper context in which to seek reconsideration of this decision. Additionally, although Comsat failed to submit the cost support data required by Section 61.38 of the Commission's Rules, the Bureau emphasized that the proposed service and rates were identical to that currently offered to carriers and information concerning this offering was already on file with the Commission. Under these circumstances, and given our stated desire to expedite implementation of our revised *Authorized User* policies, the Bureau waived the Section 61.38 requirements. The Bureau also dismissed claims that the proposed rates would be unreasonably discriminatory toward carriers, finding that Comsat's decision to charge the same rates to carriers and non-carriers by averaging costs among all users was an acceptable practice. In any event, the Bureau noted that cost differences, if any, between Comsat's provision of service to carriers and non-carriers would appear to be *de minimis.* [12] RCA now

[12] The Bureau also found no merit to the IRC claim that the revisions should be rejected or suspended pending investigation of tariff provisions which would permit the unlimited resale and shared use of international satellite circuits. The Bureau rejected this claim because the instant revisions contain specific language which conditions the resale and shared use of satellite circuits upon bilateral agreement between the United States and overseas entities. As to the argument that Comsat is precluded from offering service to non-carriers except through a separate subsidiary, the Bureau determined that the separate subsidiary require-

requests that the Commission review and summarily reverse this Bureau order.

D. *RCA's Filings*

10. RCA presents two arguments in its application for review of the grant of special temporary authority in File No. I-P-C-83-008. First, RCA argues that the action taken by the Bureau was unnecessary to achieve its stated reason. Noting that the Bureau's grant of temporary authority was based on the *Computer II* requirement that entities detariff their enhanced services by January 1, 1983, and thus become users of satellite facilities under *Authorized User* rather than carriers under Title II, RCA contends that the grant of special temporary authority to Comsat to provide direct service to users (non-carriers) was unnecessary since the Bureau, by letter dated October 21, 1982, deferred the date for carriers to file any necessary tariff revisions.[13] Second, RCA contends that the grant of special temporary authority forecloses, as a practical matter, the relief it seeks in the Section 214 proceeding, specifically its argument that (a) no authorization be granted until the Commission has completed its rulemaking proceedings on the issues of earth station ownership and direct access;[14] or (b) any authorization be conditioned to require Comsat to provide direct service to users through a separate subsidiary until the earth station ownership and direct access proceedings are completed.

11. In its motion to stay the effectiveness of the grant of special temporary authority pending review of the grant by the appropriate appellate court,[15] RCA contends that a stay is justified under the standards developed in *Virginia Petroleum Jobbers* and *Holiday Tours*.[16] First, RCA argues that it is likely to prevail on the merits of

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ment set out in the *Comsat Structure* order applies to Comsat's entry into the end-to-end service market in competition with the IRCs and is therefore not relevant to Comsat's provision of INTELSAT basic transmission capacity to non-carriers as contemplated in *Authorized User*.

[13] The pertinent part of the Bureau letter deferring the effective date is as follows:

> To the extent that you, or any other international carrier, are of the opinion that tariff modification for existing international services are warranted to comply with Computer II, any requirement to file appropriate tariff revisions for these services is deferred until the Commission has acted on the pending petitions filed in connection with the above-referenced order.

Letter to RCA, dated October 21, 1982.

[14] *See* note 8, *supra*.

[15] In the alternative, RCA requests that a limited stay be granted "pending submission to, and review by, the court of appeals of a motion by RCA Globcom to stay the effectiveness of such awards pending review thereof by the court." (RCA stay motion, page. 2).

[16] Virginia Petroleum Jobbers Association v. FPC (Virginia Petroleum Jobbers), 259 F.2d 921 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours (Holiday Tours), 559 F.2d 841 (D.C. Cir. 1977).

its appeal because (a) the Commission has unlawfully revised its *Authorized User* policy; (b) the Commission has departed from a Congressionally sanctioned policy without taking concurrent action on the IRC requests for cost-based access to INTELSAT; and (c) the grant of special temporary authority was unnecessary. Secondly, RCA contends that it will be severely and irreparably injured in the absence of a stay. In support of this claim RCA submitted a separate study on traffic and revenue diversions relating to our *Authorized User* decision and the provision by Comsat of direct private line service to non-carriers at U.S. international earth stations. According to RCA, Comsat's entry into the retail market will inflict quantifiable revenue losses on RCA in excess of $17.9 million annually ($11.9 million in pretax income after deducting avoidable costs) until RCA gains cost-based access to INTELSAT. RCA further states that other losses not subject to quantification will also occur. Thirdly, RCA avers that no other party will be harmed by preserving the *status quo* through the issuance of a stay. RCA states that adequate service is now provided to the public at rates which reflect costs and that any delay in the initiation of direct service to non-carriers by Comsat is justified by the severity of the losses which RCA and other IRCs would face without a stay. Finally, RCA indicates that the public interest will be promoted by the issuance of a stay.

12. In its application for review of the Bureau's order denying its petition to reject or suspend and investigate Comsat's tariff revisions, RCA contends that summary reversal of the Bureau's December 29, 1982 order is warranted because the Bureau erred in waiving the cost support data required under Section 61.38 of the Commission's Rules. Thus, according to RCA, information necessary to determine whether cost differences in the provision of service to carriers and non-carriers warranted different rates, or whether it was reasonable for Comsat to average such costs among both carrier and non-carrier customers, was excluded. Indeed, RCA concludes, the Bureau, in dismissing the IRC's claim that Comsat's rate averaging was unreasonably discriminatory, relied upon estimates furnished by parties opposed to Comsat's tariff proposal.[17]

II. *Discussion*

13. In our *Authorized User* decision we found that permitting non-carriers to obtain basic transmission capacity directly from Comsat on the same terms and conditions Comsat now offers to

[17] RCA Globcom also contends that the Bureau's action was inconsistent with its disposition of similar claims regarding Comsat's extension of its television services to all users in Communications Satellite Corporation, 79 FCC 2d 562 (1980). It is argued that in that case, where Comsat also failed to submit Section 61.38 material, the Bureau sought additional information on expenses related to direct user service. *See* para. 31, *infra*, for discussion of this issue.

carriers would advance the goals of the Communications Satellite Act, provide additional benefits and alternatives to users, and otherwise serve the public interest. We also found that permitting Comsat to provide end-to-end service, through a separate subsidiary and in competition with the IRCs, would be beneficial to users. The RCA and other IRC filings once again largely repeat arguments that were previously rejected in the Commission's *Authorized User* decision and the recent order denying WUI's motion for stay.[18] Upon consideration of the filings before us we shall grant Comsat's application in File No. I-P-C–83–008 to implement our *Authorized User* decision and deny RCA's application for review of the Bureau's order denying its petition to reject or suspend and investigate Comsat's tariff revisions. Below we discuss the basis for these actions.[19]

A. *Comsat Application File No. I-P-C–83–008*

14. We cannot agree with the IRCs that Comsat's request for authority to implement our *Authorized User* decision should be deferred, denied or conditioned. First, in our *Authorized User* decision we analyzed the Communications Satellite Act and carefully traced the history of the provisions relating to Comsat service offerings. We found that the plain language of the Communications Satellite Act does not bar Comsat from providing service directly to users. We also found that the Congressional history and various floor statements could not reasonably be read to suggest that Comsat must be limited to the role of a carrier's carrier.[20] We therefore concluded, in view of the anticipated benefits of direct access by users to basic transmission capacity, that the public interest would be served by modifying the existing *Authorized User* policy. Second, permitting Comsat's World Systems Division to offer basic transmission capacity directly to non-carrier users is not inconsistent with our *Comsat Structure* order. Both *Authorized User* and *Comsat Structure* require Comsat to engage in any competitive undertaking through a separate subsidiary. The provision of end-to-end services by Comsat similar to those offered by the IRCs would be such a competitive undertaking. End-to-end service offerings could only be offered through a separate subsidiary which leased satellite capacity under tariff from Comsat's World Systems Division. *Authorized User*, 90 FCC 2d at 1421. The offering of basic transmission capacity

[18] Authorized User, FCC 82–464 (released November 2, 1982).

[19] The grant of Comsat's underlying application moots RCA's motion for stay and application for review of the grant of special temporary authority. Similarly, WUI's motion for stay is also mooted. However, in acting on Comsat's application, we have considered as supplemental pleadings these RCA and WUI filings relating to the Bureau's grant of special temporary authority.

[20] We reached the same conclusion in Spanish International Network, 70 FCC 2d 2127 at 2133–40 (1978).

either to carriers or non-carriers, however, is a monopoly function to be provided by the World Systems Division under the *Comsat Structure* and *Authorized User* decisions. 90 FCC 2d at 1420–21. Third, Commission action in the separately docketed proceedings relating to cost-based operational and financial access to INTELSAT by the IRCs is simply not a condition precedent to implementation of our *Authorized User* decision. 90 FCC 2d at 1433–34. Deferring action on this application would disadvantage users and enhanced service providers who desire or are required to directly access basic transmission facilities from Comsat. Additionally, *Authorized User* implementation impacts only the U.S. portion of an international satellite transmission. It does not affect the operations of INTELSAT or any foreign administration unless that foreign administration opts to operate directly with a U.S. non-carrier user. On the other hand, the proceedings inquiring into the direct operational and financial access to INTELSAT by U.S. carriers raise distinct legal, economic and technical issues, many of which directly impact the operations of INTELSAT and our foreign partners. Moreover, although the question of direct operational (earth station ownership) and financial access to INTELSAT by U.S. carriers has been raised in other proceedings, it is a subject matter on which we only recently have received any significant amount of direct information on which to base any tentative or final conclusions. Fourth, as noted in the Bureau's tariff order, Comsat's tariff revisions would not violate the CCITT's recommendations restricting resale or shared use of private lines. Fifth, the IRCs have not submitted any persuasive evidence or documentation that direct user access to basic transmission capacity would violate the antitrust laws, result in higher charges to ratepayers or create an unlawful discrimination. Sixth, a clear basis exists in the rulemaking and application proceedings to warrant without an evidentiary hearing a finding that a grant of the pending application is required by the public convenience and necessity. We have already found that providing basic transmission capacity to non-carriers in the expending international market is reasonably feasible and will result in specific and definite benefits to users. 90 FCC 2d at 1419–32. Comsat's application, which indicates that carriers and non-carriers will be provided the same service at the same rate, reinforces this public interest finding. See *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

15. In the Comsat application proceeding, RCA submitted a traffic and economic diversion study to support its contention that a grant of Comsat's application to provide basic transmission capacity to all users would severly and irreparably injure RCA (and the other IRCs) and would not be in the public interest. We believe it necessary to respond to RCA's submission. The RCA study, filed on December 16, 1982, makes an estimate of the potential traffic diversion from RCA to Comsat. This traffic diversion is then converted into an

estimated loss of revenue and pre-tax net income. RCA estimates that it could lose as much as $17.9 million in revenue annually, with a net loss of $11.9 million in pre-tax net income after deducting avoidable costs.[21] In conducting its diversion analysis, RCA employs the following underlying assumptions (a) Comsat will continue to offer basic transmission service at U.S. earth stations at a tariffed rate of $1125 per month per half-circuit (channel); (b) Comsat's marketing activity to attract customers will not exceed current industry levels; (c) customers switching their service from RCA to Comsat will make their own arrangements at their own expense for connecting lines between their premises and the nearest U.S. general purpose earth station and for other services now provided by RCA; and (d) RCA would continue to offer leased channel services under its existing rate structure and at existing rate levels. This final assumption, RCA claims, is based on an examination of the impact of reducing cable rates and a conclusion that such a rate reduction is impractical. RCA states that a reduction in its rates for leased channel services would have a negative effect on its profits. Furthermore, RCA states that it would have to reduce its average rate for leased channel services (approximately $3,980 per month per half-circuit) by 55% in order to match a customer's out-of-pocket expense of dealing directly with Comsat ($1,125 per monthly half-circuit for the space segment plus, on the average, approximately $600 for the domestic landline circuit).

16. In developing its study, RCA excluded all narrowband users as well as wideband leased channel customers in markets Comsat is not authorized to serve (Hawaii, Puerto Rico, and Mexico). RCA thus confined its study to revenues and costs for 548 half-circuits, of which 314 are routed over satellite facilities and 234 are routed over cable facilities. Users were then divided into three categories: customers leasing three or more half-circuits per month; two half-circuits per month; and one half-circuit per month.

17. In RCA's judgment, these categories take into account the trade-off each customer would have to consider in deciding whether to obtain service directly from Comsat or to remain a customer of the IRC, *i.e.*, an evaluation of the cost savings available to customers willing to act as their own "general contractor" in arranging end-to-end services and the additional costs involved in such self directed routing, testing and monitoring.[22] RCA states that large users (three

[21] In reality, what is characterized by RCA as a "pre-tax net income loss," can be viewed through glasses of a slightly different tint and be characterized, to a degree, as "savings" for end-users.

[22] In obtaining satellite transmission capacity directly from Comsat a user would have to perform a variety of testing, maintenance, monitoring, conditioning, balancing and restoration tasks now provided by the IRCs. The user would also have to make its own domestic and foreign transmission tail or link facility arrangements.

or more half-circuits) would find direct access to Comsat to result, on balance, in substantial savings. This would be less true for medium-sized customers (two half-circuits); and the cost savings for small customers would, in many cases, not equal the costs of acting as "general contractor."

18. Of those RCA customers leasing three or more half-circuits, which account for 318 of the study's 548 half-circuits, the largest user by far is the Department of Defense (DOD), which leases 109 channels (43 satellite, 66 cable). RCA estimates that DOD might immediately transfer to Comsat all 43 circuits utilizing satellite facilities and 33 (50 percent) of the circuits using cable facilities, thus accounting for a transfer of 76 of 109 DOD circuits (nearly 70%) from RCA to Comsat. In regard to other large users, based upon a customer survey, RCA "generally concludes" that such customers "might" take advantage of Comsat's lower rates unless RCA had previously installed specialized switching equipment. RCA estimates that nearly 80% of these customers might divert to Comsat.

19. For customers leasing two half-circuits, RCA concludes that those likely to switch would have the technical know-how and sophistication in arranging connecting circuits and could provide services to maintain existing channels. Based upon a customer-by-customer estimate, RCA is of the opinion that nearly 60% of these channels might be diverted to Comsat. For those customers leasing only one half-circuit, it was concluded that approximately 21% of these leased channels might be switched to Comsat. This was based on a judgment that only high-technology firms would arrange for connecting circuits or maintenance personnel.

20. After estimating potential traffic diversion in all three categories, RCA quantifies this diversion with respect to circuit revenue, equipment revenue, landline costs and international facility costs for both satellite and cable circuits. RCA concludes that its estimated traffic losses would result in an annual reduction in leased channel revenues of $15.5 million and equipment revenues of $2.4 million, for a total annual revenue reduction of $17.9 million. After deducting $6.0 million of avoidable or variable costs, *i.e.*, those current costs which would be avoided by losing a customer, RCA estimates that it would experience an $11.9 million reduction in pre-tax net income.

21. Finally, RCA estimates that there will be other adverse financial effects upon it which are not included in the $17.9 million revenue loss estimate. This refers to the embedded or fixed expenses related to the furnishing of leased channel service by RCA, such as facilities, manpower and equipment. RCA states that there could be idling of plant facilities. Additionally, fixed expenses such as cable operation and maintenance would continue even in the absence of leased circuit revenues.

22. For the reasons discussed below we cannot give RCA's

diversion study significant weight. Several of the assumptions made by RCA in its traffic diversion study are subject to serious question. It is claimed, for example, that there would be no reduction in RCA's leased channel rates to counter competition from Comsat because even a slight reduction in rates would have a negative effect on profits. RCA's average monthly half-circuit rate of $3,980 is more than twice as large as the combined $1,125 Comsat service charge and the average landline circuit change of $600 per month. This difference of over $2200 per half circuit per month goes toward the cost of additional services provided by RCA (testing, monitoring, etc.) and RCA's margin of profit. Although the costs for these services are not provided, RCA in essence claims that there is no room for reduction in any of these costs. We cannot accept this unsubstantiated contention. Furthermore, even if there were a reduction in profits, it would not necessarily be in the public interest to deny an application to shield a business from the rigors of competition.

23. Another speculative assumption is "that the DOD may immediately transfer to Comsat all those circuits utilizing satellite facilities and 50 percent of the circuits using cable facilities." This would account for nearly 70% of RCA's leased channel traffic from DOD and nearly 25% of the total circuit loss claimed in RCA's study. However, DOD has clearly stated that it has never contemplated transferring all commercial satellite service to Comsat, even if it could deal directly with Comsat.[23] In fact, DOD indicates that its policy is, and will continue to be, to acquire international leased channel service (cable or satellite) from an IRC on an end-to-end basis. DOD further asserts that it intends to deal directly with Comsat in "only those unique and critical instances (where DOD needs) dedicated wideband links between military installations . . . ," which constitute "a limited portion of DOD international leased-channel requirements." Additionally, RCA's claim that DOD would shift 50% of its cable channels to Comsat is wholly speculative. Its only basis for this assumption is that outside of the U.S., the DOD policy of diversity mix might take second place to the savings involved. First, this does not appear logical in that diversity of circuits to overseas installations may be particularly important to DOD and second, shifting of cable circuits is contrary to DOD's own statements on the subject.

24. Another speculative assumption by RCA is that, for large users, nearly 80% of the non-DOD leased channels might be diverted to Comsat. Although RCA states that this estimate was based upon a customer-by-customer survey, the language used by RCA indicates substantial un ertainty, *i.e.* "it was generally concluded that such customers might take advantage of Comsat's lower rates . . . ."

[23] *See* DOD Opposition to Motion for Stay (page 5–6) in CC Docket No. 80–170, Authorized User, filed September 7, 1982.

Furthermore, we cannot assume, as RCA does, that a vast majority of large users would find Comsat half-circuits a suitable substitute for the IRCs' full service, end-to-end leased channel offering. We note that DOD, the largest user of such end-to-end services, has stated that direct Comsat service will be useful only for a small percentage of its needs and that it will retain the bulk of its IRC provided end-to-end service. In sum, we find unpersuasive RCA's estimates relating to the potential diversion of DOD and other large user traffic to Comsat. We also note that this traffic segment accounts for over 75% of the traffic diversion estimated by RCA in its study.

25. Even if we were to accept all of RCA's contentions, its losses would equate to only about 9% of its total annual revenues, assuming it made no effort to competitively respond to customer desertions. It is questionable whether this loss would be so substantial as to threaten RCA's ability to continue to adequately provide service to the public. RCA has also not considered in its claim of irreparable injury the fact that the market for all types of international record services is likely to grow, thus helping to offset any potential revenue losses from leased channel services. We therefore cannot conclude, as RCA invites us to do, that a grant of this application would irreparably injure the IRCs and would not be in the public interest.

26. Furthermore, we will not specifically impose the conditions proposed by TRT in its petition to deny. Nevertheless, it should be abundantly clear that *Authorized User* permits World Systems Division to offer non-carriers only basic transmission capacity under the same terms and conditions as that capacity is provided to carriers. 90 FCC 2d at 1419–22. In addition to the provision of an end-to-end service, the provision of additional or incidental service functions may not be provided by World Systems Division pursuant to *Authorized User*.[24] While Comsat appears to generally recognize these operating parameters in its application and opposition filing, we note that the application contains some vague language describing World Systems Division's proposed operatings functions. This language is as follows: "These activities may include the conclusion of agreements with overseas administrations, particularly where new services or facilities are involved." To the extent that this language relates to routine technical arrangements for the narrow provision of basic transmission capacity (earth station and space segment) it does not conflict with the policy enunciated in *Authorized User*. To the extent that this language relates to the provision of additional or incidental service functions beyond the earth station

[24] Such incidental or additional services include, but are not limited to, reciprocal billing, direct or indirect acquisition of tail/link facilities, foreign operating agreements, and end-to-end monitoring, coordination and testing.

and space segment it conflicts with our *Authorized User* policy and must be rejected.

27. Finally, we are aware that RCA and WUI have filed requests for stay pending court review of our *Authorized User* decision, and RCA has indicated here that it intends to seek judicial stay of Comsat's Section 214 authorization. While those remarks were directed toward the temporary authority awarded to Comsat, it is evident that they are equally applicable to the permanent 214 authorization granted herein. It is also clear that the arguments raised against the temporary authority would be applicable to any stay request of the permanent authorization. Therefore, in order to conserve both petitioners' and our own resources, and in the interests of expedition, we have considered here whether RCA's arguments would warrant a stay of our permanent Section 214 grant to Comsat. See Rule 18, Federal Rules of Appellate Procedure.

28. The four criteria for issuance of a stay are found in *Virginia Petroleum Jobbers*. The elements which a petitioner must show are as follows (1) Has the petitioner shown that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? 259 F.2d at 925. The above test was slightly modified in the *Holiday Tours* decision. In *Holiday Tours* the court stated that when the second, third and fourth factors of *Virginia Petroleum Jobbers* strongly favor interim relief, a tribunal may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. 559 F.2d at 943. The "strong showing that it is likely to prevail on the merits of its appeal" language of *Virginia Petroleum Jobbers* creates a more difficult test for a movant than the "substantial case on the merits" standard found *Holiday Tours*. The court is clear in *Holiday Tours*, however, that this lower threshhold should be employed only when the court is confronted with a case in which the other three factors strongly favor interim relief. We do not believe that any of the other three factors favor RCA. Furthermore we do not believe that RCA has met even the relaxed standard of *Holiday Tours*.

29. As indicated in paragraph 14, we cannot conclude that RCA is likely to prevail on the merits of its appeal. Nor can we conclude that RCA has made a substantial case on the merits. Our analysis in paragraphs 15–25 of RCA's traffic and revenue diversion study indicates that our action here will not irreparably injure that carrier (or any other IRC). As indicated in paragraph 14, we have found that any delay would substantially harm non-carrier users, Comsat and enhanced service providers. Finally, the benefits described in our *Authorized User* decision indicate that the public interest would not be served by the issuance of a stay. Therefore, unless the parties can

produce new evidence, we would be unwilling to further delay the effectiveness of the actions taken here.

B. *RCA's Application for Review of the Bureau's Tariff Order*

30. We now turn to RCA's request that we reverse the Bureau's order denying its petition to reject or suspend and investigate Comsat's revisions to Tariff F.C.C. No. 101. As explained, petitioner contends that the Bureau's waiver of Section 61.38 was in error because it made it impossible to determine the reasonableness of Comsat's proposal to offer this service to both carrier and non-carrier customers at the same rates by averaging costs among all users. The implication appears to be that had Comsat been required to file cost support material, that material would have shown the difference in costs between providing service to carriers and non-carriers to be sufficiently substantial to warrant rate deaveraging, *i.e.*, a rate discount for carriers or a higher rate for non-carriers.

31. We find this contention to be without merit. As the Bureau correctly observed, Section 61.38 data are not required in all cases, particularly where adequate information is already available. *Communications Satellite Corporation*, 75 FCC 2d 562, 654–65 (1980). Applying that principle here, it is significant that the proposed service offering to non-carriers is identical to that currently being offered to carriers, and is to be offered at the same rates. More to the point, there is already on file with the Commission cost information concerning those rates. Of all these data, RCA took issue with only one cost component, namely, additional administrative expenses related to customer sales, accounting, billing and collections which assertedly Comsat would incur in the provision of service to non-carriers. As the Bureau found, however, such expenses comprised only a small portion of Comsat's total operations. For example, the Bureau pointed out upon examination of Comsat's Annual Report Form M for 1981 on file with the Commission, advertising expenses comprised considerably less than one percent of Comsat's total operating expenses.[25] In these circumstances, particularly where, as here, Comsat has had no actual experience in providing this service to non-carriers, we find the Bureau was well within its discretion to have waived Section 61.38.[26] Moreover, given the absence of any

[25] Comsat's advertising-related expenses for 1981 totaled $991,804, only 0.3 percent of Comsat's total operating revenues of $333,979,265 and only 0.4 percent of its total operating expenses of $252,531,326. Even assuming Comsat might incur some additional costs in expanding its service to non-carriers, the Bureau found no grounds to believe the other administrative expenses cited by RCA would be of such a magnitude to render Comsat's proposed cost averaging unreasonable. Indeed, we note that RCA made no independent showing that such expenses for service provided to non-carriers would be materially greater so as to warrant different rates for carriers and non-carriers.

[26] In addition, we find no merit in RCA's contention that the Bureau's waiver of

independent showing by RCA that the proposed revisions were unreasonably discriminatory, we agree with the Bureau that investigation of the revisions was unwarranted.

III. Conclusions and Ordering Clauses

32. In view of all the above, we conclude that a grant of Comsat's application is required by the public convenience and necessity. Accordingly, we shall grant Comsat's application and also affirm the Bureau's tariff action. Additionally, we shall deny as moot the RCA, WUI and ITT stay motions as well as the RCA and ITT applications for review of the grant of special temporary authority.

33. IT IS ORDERED that Comsat application File No. I-P-C-83-008 IS GRANTED and Comsat's World Systems Division is authorized to provide basic transmission capacity to non-carrier users at U.S. international earth stations and to obtain from INTELSAT the units of satellite utilization necessary to provide this service.

34. IT IS FURTHER ORDERED that the applications for review and motion for stay filed by RCA on December 29, 1982, the motion for stay filed WUI on January 6, 1983, and the application for review and motion for stay filed by ITT on January 25, 1983, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Section 61.38 here is inconsistent with its action in regard to Comsat's international television transmission service tariffs in Communications Satellite Corporation, 79 FCC 2d 562 (1980). RCA implies that because Section 61.38 material was not submitted in that case, the Bureau requested additional information. We note, however, that Section 61.38 was also waived in that case. The additional information referred to by RCA, which formed part of the basis for the Bureau's waiver in its 1980 decision, was requested in connection with Comsat's Section 214 application, and was thus available prior to the tariff review process.

Criminal Law, Violation of
Disqualification
Misrepresentation, Character Qualifications

Review Board affirms disqualification of broadcast applicant because of intentional and material misrepresentations made by applicant's principal in an affidavit filed with the Commission, in pre-remand hearing testimony, in sworn responses to written interrogatories on remand, and in remand hearing testimony.
–*Country Broadcasting Company*
Docket Nos. 21235 and 21236

FCC 83R-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COUNTRY BROADCASTING COMPANY High Springs, Florida	Docket No. 21235 File No. BPH-9937
ALACHUA BROADCASTING, INC. Alachua, Florida	Docket No. 21236 File No. BPH-10269
For Construction Permit	

Appearances

James E. Forsman and *David Meyers*, on behalf of Alachua Broadcasting, Inc.; *Vincent J. Curtis, Jr.*, on behalf of Country Broadcasting Company; and *Charles W. Kelley* and *Arthur I. Steinberg*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: February 14, 1983; Released: February 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. Even in comparative broadcast proceedings, "a little neglect may breed great mischief".[1] What began as a simple contest between Country Broadcasting Company (Country) and Alachua Broadcasting, Inc. (Alachua) for authority to construct a new FM broadcast station (Channel 285)[2] at High Springs or Alachua, Florida, has now

[1] Benjamin Franklin, *Poor Richard's Almanac* (1758).

consumed six years, two Initial Decisions, and two Review Board appeals. In the first Initial Decision, 71 FCC 2d 1238 (1978), then-presiding Administrative Law Judge Frederick W. Denniston concluded that Alachua would have been the preferred applicant under the Section 307(b) issue, but disqualified Alachua under misrepresentation and Section 1.65 failure-to-report issues and granted Country's application. By Memorandum Opinion and Order, 71 FCC 2d 1222, 45 RR 2d 551 (1979), the Review Board held that the record evidence under these latter issues was not sufficient to warrant Alachua's disqualification but that the proceeding should be remanded to explore the knowledge, participation, and responsibility of Alachua principal James E. Forsman for the alleged failure of two of his corporations to remit to the government funds withheld from wages for social security (FICA) taxes.[3] [4]

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[2] By Order, 42 Fed. Reg. 34916, published July 7, 1977, the applications were designated for hearing to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), which of the proposals would better provide a fair, efficient, and equitable distribution of radio service, and, in the event that a choice between the applicants should not be based solely upon considerations relating to Section 307(b), to determine on a comparative basis which proposal would better serve the public interest. Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[3] Although the Commission does not generally inquire in the first instance into alleged violations of the statutes or rules of another federal agency, the Board felt compelled to add the tax issue because of *The Noble Broadcasting Corp.*, 1 FCC 2d 154, 155, 5 RR 2d 915, 918 (1965), in which the Commission held that "the licensee has twice failed to remit withholding taxes and was subjected to tax liens therefor, which failures reflect adversely upon its qualifications." Yet the circumstances under which the Commission will adjudicate alleged violations of strictures other than the Communications Act or Commission rules remain uncertain. For example, *compare Intercontinental Radio, Inc.*, 88 FCC 2d 819, 823, 50 RR 2d 1073, 1077 (1981) (FCC will not adjudicate alleged violations of National Labor Relations Act where allegations not first submitted to NLRB) *with Gross Telecasting, Inc.*, 55 FCC 2d 295, 34 2d 1491 (1975) (unfair labor practices issue added despite NLRB consent decree); also *compare Katy Communications, Inc.*, 87 FCC 2d 764, 49 RR 2d 1671 (1981) (consent decree with SEC over alleged securities and banking violations not cause for further FCC inquiry) *with Abbey J. Butler*, 47 RR 2d 852 (1980) (consent decree with SEC and commodities violations affirmed by CFTC raise public interest questions requiring hearing); also *compare Kaye-Smith Enterprises*, 90 FCC 2d 27, 39, 51 RR 2d 839, 848 (1982) (FCC will not in the first instance investigate alleged violations of state perjury laws) *with Central Texas Broadcasting Co.*, 74 FCC 2d 393, 396–397, 46 RR 2d 951, 959 (1979) (Commrs. Fogarty and Jones dissenting) (issue added to determine whether principal of applicant violated state usury laws).

We note that the concerns expressed by Commissioners Fogarty and Jones in *Central Texas, supra*, about the present lack of "fully adequate guidance for fair and consistent resolution" of character issues are also manifested in the Commission's recent *Notice of Inquiry, General Docket No. 81–500*, 87 FCC 2d 836 (1981) (FCC Policy on Character Qualifications), and believe that any future uncertainties will be resolved therein.

2. On remand, Administrative Law Judge Byron E. Harrison (ALJ) was designated to preside in this case. He deleted the issues indicated in note 4, *supra*, expanded the FICA tax inquiry to include failure to remit wages withheld for federal income tax purposes,[5] and added an issue to determine whether James Forsman had intentionally misrepresented facts to the Commission concerning the tax issues since early 1978.[6] By Initial Decision (I.D.), FCC 82D-42, released May 27, 1982, the ALJ reaffirmed Alachua's Section 307(b) preference, but concluded that Alachua should be disqualified because of Forsman's wilful conduct in knowing about, participating in, and being responsible for his companies' failure to remit withheld FICA and federal income taxes, and, as an independent disqualifying basis, because of Forsman's significant misrepresentations concerning his alleged lack of contemporaneous knowledge and involvement in these matters. I.D., Conclusions, 7, 9, 10, 29, 30. He therefore denied Alachua's application and granted Country's.

3. The proceeding is now before the Review Board on exceptions filed by Alachua and reply briefs filed by Country and the Mass Media Bureau. The Board has reviewed the second Initial Decision in light of the exceptions and briefs (including exceptions held in abeyance by the Board's remand order) and our examination of the entire record in this proceeding.[7] We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's conclusion that Alachua is not qualified to be a Commission licensee and the ALJ's grant of Country's application. Because we concur in Alachua's disqualification, we do not reach the question whether Alachua's Section 307(b) preference would otherwise have been dispositive, thereby eliminating Country's High Springs application from comparative consideration,[8] or whether, if not dispositive, the ALJ properly resolved the contingent comparative issue in Country's favor.

4. In its seven pages of exceptions, Alachua takes issue with a number of the ALJ's specific findings of fact and conclusions concerning James Forsman's knowledge of and responsibility for his companies' tax problems. While we agree with Country and the Bureau that the exceptions are not in proper form and do not point out with particularity alleged material errors, Sections 1.276(a) and

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[4] Further hearing was also ordered on the Section 307(b) issue and a related comparative coverage issue; however, by Memorandum Opinion and Order, FCC 80M-1045, released June 23, 1980, these remand issues were deleted.

[5] Memorandum Opinion and Order, FCC 79M-857, released July 26, 1979.

[6] Memorandum Opinion and Order, FCC 80M-503, released March 25, 1980.

[7] Alachua originally requested oral argument, which was granted by letter dated October 12, 1982. However, when Alachua failed to file a notice of intention to participate in the argument, the Board granted Country's motion to delete the oral argument by letter dated November 19, 1982.

[8] *See WHW Enterprises, Inc.* , 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982) (dispositive Section 307(b) preference affirmed).

1.277(a) of the Commission's Rules, 47 CFR § 1.276(a) and 1.277(a), we shall nevertheless consider them on the merits.[9] *See Kenneth L. Gilbert*, 92 FCC 2d 126, 52 RR 2d 965, 966 n. 3. The general tenor of Alachua's exceptions is that "the facts do not support a conclusion that there were acts of inappropriate conduct on the part of Mr. Forsman with respect to the payment of IRS matters" (Br., p. 1), and that the I.D. "oversteps the bounds of conclusion based upon fair inference and moves into the realm of speculation based upon out-of-context answers and suppositions based upon answers which were given directly in testimony and by answer to interrogatory" (Br., p. 7). Alachua requests that either it be found basically qualified and issued a grant based on its Section 307(b) preference or that the case be remanded for the taking of further evidence. *Id.*

5. Alachua devotes most of its argumentation to analyzing selected paragraphs of the ALJ's findings on the two tax issues. While we have carefully reviewed each of these arguments and believe that all of the findings contained in the challenged paragraphs are adequately supported by record evidence and that Alachua's criticisms are erroneous, unsupported, or speculative, we base our affirmance of Alachua's disqualification solely on the misrepresentation issue.[10] In so doing, we concur with the ALJ's conclusion that the misrepresentations in question were serious enough to warrant disqualifying Alachua, standing alone, without adverse findings and conclusions on the tax issues.

6. *Misrepresentation issue.* In addition to being the secretary-treasurer, a director, and a 45% stockholder of Alachua, James E. Forsman was responsible for preparing Alachua's application and was Alachua's principal witness and chief proponent throughout this proceeding. Alachua Exh. 19. The misrepresentation issue derives from Forsman's additional business interests as president, director, and 90–100% owner of Young American Clothiers, Inc. (YAC), a retail clothing business, from 1975 onward, and as vice-president, director, and 33% stockholder of Great Southern Music Hall, Inc. (GS), a multi-purpose entertainment center, from 1974 until October 1978. Alachua Remand Exh. 1. In the original proceeding, it appeared that Alachua had failed to report various claims and lawsuits pending against Forsman, YAC, or GS, including federal tax liens, and by Memorandum Opinion and Order, FCC 77M-1951, released November 16, 1977, Judge Denniston added an issue to determine whether Alachua had misrepresented facts or exhibited lack of candor to the Commission regarding the existence of such claims and suits. On December 19, 1977, Country filed a further

[9] We note that counsel for Alachua withdrew from this proceeding on July 19, 1982, and Alachua's exceptions were filed by James Forsman (as Alachua's secretary-treasurer) 30 days later.

[10] See note 3, *supra.*

petition to enlarge issues seeking to explore the effect on Alachua's qualifications of the fact that the tax liens in question resulted from YAC's and GS's failure to remit funds withheld from wages for FICA taxes. By Memorandum Opinion and Order, FCC 78M-343, released March 6, 1978, Judge Denniston denied the requested issue, relying largely on the fact that the matter had already been explored under existing issues at the hearing and on Forsman's January 30, 1978 exculpatory affidavit that was attached to Alachua's opposition to Country's petition.

7. In the first Initial Decision, Judge Denniston concluded that Alachua had violated the reporting requirements of Section 1.65 of the Rules and that Forsman had lacked candor and misrepresented in failing to disclose all claims, including the tax liens. 71 FCC 2d at 1276–77. However, the Judge accepted Forsman's explanations that the withheld tax funds were retained because of the "failure" of Forsman's accountant, that Forsman was unaware of the situation at the time, and that when he became aware he took voluntary action to rectify it by entering into installment payment plans with the Internal Revenue Service. *Id.*, at 1251; Tr. 381–386, 393–394, 624–626. Hence, the Judge concluded that "no character considerations are raised" by the underlying cause for the tax liens. *Id.* at 1277.

8. At the remand proceeding, the issues explored (see paragraphs 1 and 2, *supra*) revealed a very different picture concerning Forsman's alleged lack of awareness or involvement in his companies' failure to remit withheld FICA and federal income taxes in a timely fashion. Forsman continued to rely on his January 30, 1978 affidavit (see paragraph 6, *supra*), in which he asserted that "The failure to remit was not brought to my attention contemporaneously with any of these events" and "The failure to remit these taxes was directly contrary to company policy concerning both Corporations in question." Country Remand Exh. 3, p. 2. This theme was also presented in Forsman's pre-remand hearing testimony (see paragraph 7, *supra*), in his sworn responses to the Bureau's and Alachua's written interrogatories on remand (I.D., Findings, paras. 72–73), and in his remand testimony (Alachua Remand Exh. 1; Tr. 1647–53, 1659–66, 1685, 1692–93, 1703, 1710–18). On the other hand, unlike the pre-remand hearing, three of Forsman's former corporate treasurers or bookkeepers—Ralph Childs and James D. Riley, Sr. at YAC and William O'Byrne, Ralph Childs, and James D. Riley, Sr. at GS—testified at great length[11] that during their successive tenures from June 1974 through September 1978, Forsman *was* contemporaneously aware of his companies' severe cash flow problems and of

[11] Ralph Childs-Tr. 1323–25, 1339–43, 1352, 1384–88; James D. Riley, Sr. -Tr. 1435–41, 1454–55, 1461; William O'Byrne -Tr. 1517–28, 1537–38, 1554–56, 1564–65, 1579, 1583.

their inability to remit the FICA and income taxes of their employees in a timely fashion. While there was no company policy or directive from Forsman prohibiting the prompt payment of the taxes, it is clear that the highest payment priority went to "door openers"—bills that had to be paid in order to keep the companies' doors open—such as utilities, telephone, and C.O.D. deliveries—and that the taxes were not "door openers". It is also clear, according to the bookkeepers, that Forsman specifically and contemporaneously knew when the taxes were not being timely paid due to lack of funds, because the three men orally told him, gave him slips of paper or lists which showed the taxes as unpaid accounts payable, or kept accounts payable notebooks with which Forsman was familiar.

9. In the I.D., the ALJ acknowledged that the record evidence reveals "a direct conflict of testimony as to Forsman's contemporary knowledge" of the non-timely payment of taxes, and that the outcome turned on the credibility of Forsman versus his bookkeepers. I.D., Conclusions, paras. 4–5. He concluded that the testimony of Childs and Riley was "more credible than that of Forsman and "accepted" O'Byrne's testimony over that of Forsman. *Id.*, paras. 5 and 6. Forsman's testimony concerning his lack of knowledge was "rejected" and deemed "simply not acceptable" when compared to that of the bookkeepers. *Id.*, para. 6. Even if O'Byrne's testimony were discounted because of his prior criminal record (I.D., Findings, para. 75) and because he was testifying under a grant of immunity from personal self-incrimination (I.D., Findings, para. 47 n. 9), the ALJ held that there would be sufficient other evidence to demonstrate that Forsman had contemporaneous knowledge of the tax problems. *Id.* In sum, he concluded that Forsman's inaccurate testimony, answers to interrogatories, and affidavit were misrepresentations which were "either deliberate and intentionally deceptive or . . . made with such wanton, gross and callous disregard for the truth as to reflect the equivalent of an affirmative and deliberate intent," and that they were significant enough to warrant disqualifying Alachua. *Id.*, paras. 10 and 30. We agree.

10. The Commission is generally reluctant to overturn the credibility determinations of an ALJ unless his findings are patently in conflict with the record evidence, *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972), because the trier of fact has enjoyed a superior opportunity to evaluate the witnesses' demeanor and judge their credibility, and his determination is entitled to significant weight. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). *See also FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955), and *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965). Our examination of the record evidence herein indicates that the ALJ's credibility conclusions are abundantly supported and well reasoned. On the one hand, the three bookkeepers had no personal interest in the outcome of this proceeding or reason to

deceive; indeed, O'Byrne testified (Tr. 1516) that Roy Kinsey, Alachua's president, director, and other 45% owner, was his primary source of income at the time of the remand hearing. On the other hand, Forsman's interest in the favorable outcome of this proceeding is obvious, and it is simply incredible that the man who effectively "ran" YAC and GS (Forsman)[12] would be unaware that tax payments were not being made or that sole responsibility for these decisions would reside with his bookkeepers. While Forsman maintains that he delegated responsibility for tax payments to his employees, including the authority to determine whether and when tax bills would be paid (Alachua Remand Exh. 1, pp. 3 and 8), this alleged delegation did not preclude him from having contemporaneous knowledge about the companies' tax situation. Yet he denied knowledge as well as responsibility. In light of the cumulative rebuttal testimony, and given Forsman's significant corporate and day-to-day roles with YAC and GS and his heavy ownership interests, Forsman's denials of knowledge cannot be credited, and Alachua's exception that the ALJ disregarded Forsman's record testimony and affidavit and reached a conclusion (that Forsman made misrepresentations) that is "unwarranted within the facts contained in the record" (Br., p. 6) must be denied.

11. Having affirmed the ALJ's conclusion that Forsman made numerous misrepresentations in this proceeding, the final question is whether these misrepresentations warrant the extreme penalty of disqualification. Because the misrepresentation issue was added on both a basic qualifications and a comparative basis, some level of comparative demerit would be a permissible alternative. However, we agree with the ALJ that Alachua's disqualification was appropriate. Since the Commission's entire scheme of regulation is premised on our ability to depend on the accuracy and truthfulness of our licensees' representations to us, *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157, 37 RR 2d 1235, 1248 (1976), *a fortiori* these representations are significant where a prospective licensee's qualifications are being examined. Forsman embarked upon a pattern of intentional deception in this case in January 1978 that has continued to this date. The deception was successful in two matters before Judge Denniston (see paragraphs 6 and 7, *supra*), which caused him not to add a special tax lien character issue against Alachua and not to make adverse character determinations based on the tax lien evidence that was received under other issues. These consequences illustrate the materiality and significance of Forsman's misrepresen-

[12] Alachua asserts in its exceptions, at pages 5 and 6, that GS's board of directors, not Forsman, "really ran" GS's day-to-day affairs. We note that Forsman was the board member most involved in day-to-day operations (I.D., Findings, para. 33) and O'Byrne's unrebutted testimony that the board generally met "at least monthly" but sometimes as often as "two or three times in one week." Tr. 1575. This hardly constitutes day-to-day control by the *board*.

tations. Forsman's denial of contemporaneous knowledge of his companies' tax problems was more than "a little neglect" (see paragraph 1, *supra*), and it clearly created great mischief under the circumstances of this case. Moreover, untruthfulness in an applicant's affidavits or responses to an adversary's interrogatories is as much to be condemned as deception at a hearing itself. *Compare WNST Radio*, 70 FCC 2d 1036, 44 RR 2d 492 (Rev. Bd. 1978) (applicant disqualified for misrepresentations made in interrogatories and at hearing) *with Grenco, Inc.*, 39 FCC 2d 732, 26 RR 2d 1046 (1973) (an applicant that deliberately lies in its testimony before the Commission will be disqualified). Finally, while we note that Forsman technically has only a minority ownership interest in Alachua (45%), his significant role as a principal (see paragraph 6, *supra*) is sufficient to cause Alachua's disqualification because of his delicts. *See WNST Radio, supra* (application denied because of misrepresentations by 12.5% stockholder, president, and director of applicant). We conclude that disqualification is the appropriately grave consequence of Forsman's conduct in this proceeding. *E.g., Nick J. Chaconas*, 28 FCC 2d 231, 21 RR 2d 576 (1971), *recon. denied*, 35 FCC 2d 698, 24 RR 2d 811 (1972), *aff'd without opinion*, 486 F.2d 1314 (D.C. Cir. 1973).

12. *Summation.* All exceptions having decisional significance have been considered by the Board. We affirm the ALJ's conclusion that Alachua is not qualified to be a Commission licensee. Finding that Country is qualified, we also affirm the ALJ's ultimate conclusion that a grant of Country's application will serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the application of Country Broadcasting Company (File No. BPH-9937) for a construction permit to establish a new FM broadcast station at High Springs, Florida IS GRANTED, and the application of Alachua Broadcasting, Inc. (File No. BPH-10269) IS DENIED.

JEROLD L. JACOBS
Member, Review Board
FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COUNTRY BROADCASTING COMPANY High Springs, Florida	Docket No. 21235 File No. BPH-9937
ALACHUA BROADCASTING, INC. Alachua, Florida	Docket No. 21236 File No. BPH-10269
For Construction Permits	

Appearances

David Meyers on behalf of Alachua Broadcasting, Inc.; *Vincent J. Curtis, Jr.*, and *Richard Hildreth* on behalf of Country Broadcasting Company and *Arthur I. Steinberg* and *Matthew Leibowitz* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
BYRON E. HARRISON

(Issued: May 24, 1982; Released: May 27, 1982)

1. This is a remand proceeding involving the mutually-exclusive applications of Country Broadcasting Company (Country) and Alachua Broadcasting, Inc. (Alachua) for construction permits to operate an FM Channel 285A at High Springs and Alachua, Florida, respectively. By *Memorandum Opinion and Order*, 71 FCC 2d 1222, released March 30, 1979 (MO&O), the Review Board returned this proceeding for further evidentiary hearing under the following issue:

> (1) To determine the facts and circumstances surrounding the failure of corporations wholly or partially owned by James E. Forsman to remit to the government wages withheld under the Federal Insurance Contribution Act, 26 U.S.C. Section 3102, and, in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.

The burden of proceeding with the introduction of evidence was placed upon Country and the burden of proof was placed upon Alachua.

2. By *Memorandum Opinion and Order*, released July 26, 1979 (FCC 79M-857), the Presiding Judge added the following additional issue against Alachua:

> (2) To determine the facts and circumstances surrounding the failure of corporations wholly or partially owned by James E.

Forsman to remit to the government wages withheld for federal income tax purposes, and in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.[1]

The burden of proceeding and the burden of proof were assigned exactly as in Issue 1.

3. By *Memorandum Opinion and Order*, released March 25, 1980, the Presiding Judge further enlarged the issues in this proceeding to include the following:

(3) To determine whether James E. Forsman intentionally misrepresented facts in statements filed and in testimony given in this proceeding, and in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.

The burden of proceeding with the introduction of evidence was placed upon Country and the burden of proof was placed on Alachua.

4. In addition to the Review Board's remand of this proceeding to make a record on Issue 1, *supra*, the Board also reversed the Initial Decision (I.D.) of the previous Presiding Judge released July 20, 1978 (FCC 78D-48). The I.D. found that, through the actions of James E. Forsman, Alachua had made misrepresentations to the Commission and thus lacked the necessary candor to be a Commission licensee. The Board did, however, leave open the possibility that evidence under the added issue could have a bearing on the Section 1.65 qualifying issue being reversed (MO&O at paragraph 2). Further, the Board noted that where a contingent comparative issue is included in a proceeding, it is incumbent upon the Presiding Judge to make findings and reach a conclusion on the issue (MO&O at N. 12). Accordingly, the prior hearing record and the proposed findings and conclusions will be considered at this time in disposing of the issue.

5. The Review Board's MO&O also found that subsequent to the release of the I.D., the Commission granted a construction permit to Hall Broadcasting Co., Inc. (Hall), licensee of Station WIYD-FM at Palatka, Florida. The Hall construction permit authorized increased electrical coverage for Station WIYD-FM. This increased coverage appeared to effectively eliminate the so-called "white" and "grey" coverage areas claimed by Alachua which were a key element in the award to Alachua of a Section 307(b) preference. The sole reason for the remand of the 307(b) issue for further evaluation was the changed circumstances resulting from the Hall construction permit. By letter of March 13, 1980 and filed with the Commission on March 17, 1980, the President of Hall requested the Commission to cancel

[1] Issue 2 was added because it appeared from the Review Board's remand MO&O that the Board wished to make a record on both Social Security and wages withheld from employees for income tax purposes.

the Hall construction permit for WIYD-FM. Accordingly, it was concluded in a *Memorandum Opinion and Order* released June 23, 1980 (FCC 80M-1045), that the cancellation of the Hall WIYD-FM construction permit returns the status of this hearing record to facts already part of the record upon which the first I.D. was prepared. Based upon this finding, it was concluded that the hearing record is full and complete on the Section 307(b) issue and further consideration of the 307(b) issue was not required. Accordingly, Judge Dennison's conclusions on 307(b) remain unchanged.

6. Hearing conferences were held on May 15, 1979, June 20, 1979 July 24, 1979, November 14, 1979 and April 22, 1980. The hearings were held on July 8, 1980, July 9, 1980, September 16, 1980, February 26, 1981, February 27, 1981 and April 1, 1981. The record was closed on April 1, 1981. All parties filed proposed findings and conclusions on July 27, 1981 and Country and Alachua filed replies on August 10, 1981.

Findings of Fact

7. Before proceeding to the facts relevant to Issues 1, 2 and 3, it is appropriate to briefly review the basis for the issues and their relationship to each other. Prior to the remand, Country had submitted copies of five liens for taxes filed by the Internal Revenue Service (IRS) against Great Southern Music Hall (GSMH) and Young American Clothiers, Inc. (YAC). James E. Forsman is the Secretary-Treasurer, Director and 45% owner of Alachua and the 100% owner and Director of YAC and Vice-President, Director and 33% owner of GSMH during the time periods under examination (Alachua Remand Exhibit 1). The Board found that the possible violation of the fiduciary responsibility to the IRS on the part of companies owned or controlled by Forsman required evidentiary examination. The Board thus added Issue 1 in the instant proceeding. Because the language of Issue 1 appeared to limit any evidentiary examination to questions relating only to the withholding of wages under the Federal Insurance Contribution Act (FICA or Social Security) payments, Issue 2 was added to include examination into the question of wages withheld from employees for income tax purposes.

8. In an attempt to avoid enlargement of issues in the prior proceeding, James Forsman executed an affidavit which sought to remove him personally from all activities involving the payment of income tax and FICA payments. Forsman swore that the failure to remit funds to the federal government was not "contemporaneously" brought to his attention (Country Remand Exhibit 3; also see paragraph 128 of the first I.D.). Information was then brought to the attention of this Presiding Judge based on depositions and an affidavit in support of a petition to enlarge issues, that three former bookkeepers/comptrollers of GSMH and YAC substantially differed

with Forsman's version of these events. Based on this showing, Issue 3 was added.

Issues 1 and 2

Withholding and FICA Taxes

9. In 1971, James E. Forsman began operating a retail clothing business under the name of Young American Shops (YAS) in Gainesville, Florida. Eventually, the operation of this business came under ownership of three corporations, Young American Clothiers, Inc. (YAC), Young American Shops, Inc. (YAS) and the J&M Forsman Corporation (J&M) (Alachua Remand Exhibit 1, p. 1). For convenience, these three corporations will sometimes be collectively referred to as "Young American".

10. From 1975 to at least February 27, 1981, Forsman was President, Director and controlling stockholder of both YAC and YAS. At one time, Forsman owned 100% of the stock, but 10% went to Forsman's father, Dr. Marion E. Forsman (Dr. Forsman) in July, 1977. Dr. Forsman served as Vice-President and a Director of both YAC and YAS until his resignation on June 2, 1978. Forsman's wife, Diantha Forsman, served as Treasurer until August 1, 1976. She also served as Secretary and Director resigning on June 2, 1978. Ralph Childs served as Treasurer from August 1, 1976 to August 31, 1977. James D. Riley, Sr. served as Treasurer from August 31, 1977 and as Secretary from June 2, 1978 (Alachua Remand Exhibit 1, p. 1; Tr. 1242, 1439).

11. Young American was Forsman's primary source of business income for most of the period from 1971 through 1978. His role was for the most part supervisory. Forsman hired managers for the retail clothing stores and to the extent possible, allowed those managers to operate independently. The managers were, however, subject to review and oversight from the main office, but, Forsman planned the stores, computed pricing and profit margins, supervised the purchase of merchandise and arranged for the financing of the corporations when necessary (Alachua Remand Exhibit 1, pp. 1–2).

12. It is Forsman's testimony that it was not his practice to involve himself in the review of the financial matters of YAC and YAS. His responsibilities did not include maintaining the books and records for these companies, nor did he review such records as a part of his regular supervisory duties. Forsman was authorized to sign checks on behalf of YAC, as were Dr. Forsman, Childs, Riley and Diantha Forsman. Forsman did not assume the responsibility for drawing checks. However, he did write checks for personal withdrawals, for COD shipments when the person who normally wrote the checks was not present and for other payments on the same basis as he at times prepared checks for COD shipments. The issuance of checks to the Internal Revenue Service (IRS) was the responsibility

of Dr. Forsman, Childs and Riley (Alachua Remand Exhibit 1, pp. 2–3). However, on at least one occasion, Forsman signed a check for $4,658.22 made payable to the IRS (Alachua Remand Exhibit 14; Tr. 1621).

13. From 1971 through early 1976, Dr. Forsman was responsible for managing the finances of Young American. He deposited the receipts in an appropriate bank account and wrote checks against those receipts to pay corporate obligations. Generally, each month, Dr. Forsman reviewed at one time the accounts payable and paid those accounts which he knew were the most pressing, such as the withholding and Federal Insurance Contribution Act (FICA) taxes and other "priority" payments. Dr. Forsman also paid certain suppliers which he knew had to be paid each month. Dr. Forsman began reviewing the payable list with James Forsman because of cash flow problems[2] and conducted this review only when there were insufficient funds to pay all current bills and decisions were made where to allocate the remainder of the income received that month. They would discuss the "open" accounts payable, the amount of money available and decide what creditors would receive what amounts. Following such discussions, Dr. Forsman completed his monthly payment of bills, taking into account the decisions which had been reached (Alachua Remand Exhibit 2, pp. 1–2, Alachua Remand Exhibit 1, p. 3; Tr. 1777–79).

14. In addition to the checkbook and corporate finances, Dr. Forsman also prepared, signed and filed IRS Forms 940 and 941 (Alachua Remand Exhibit 2, p. 2). Form 940 covers the employee's contribution to the federal unemployment compensation fund. The form is filed annually and is due by January 31st of the year following the tax year. Form 941 covers the employee's withholding tax and the employee and employer's portions of the FICA taxes. The 941 form is required to be filed for each calendar quarter and is due on the last day of the month following the end of the quarter. If the liability for the month is less than $2,000, monthly deposits are permitted and must be made within seven days of the end of the quarter. Anytime the liability reaches $2,000, it must be paid in certified funds within three banking days. In any event, at the end of a quarter, the total liability must be less than $200, and must be remitted with Form 941 (Tr. 1531–32). According to Forsman, he had no direct supervisory responsibility concerning these tax returns and he did not review or sign federal withholding or FICA returns for YAC or YAS at any time (Alachua Remand Exhibit 1, p. 33).

15. Dr. Forsman left Young American for an extended vacation in August, 1976. Dr. Forsman returned to Young American in the last week of 1976 (Alachua Remand Exhibit 2, p. 2).

16. Ralph Childs was the bookkeeper/treasurer of YAC from

[2] The cash flow problem began at the end of 1974 (Tr. 1778–79).

August, 1976 through 1979, who was hired for that purpose by Forsman (Alachua Remand Exhibit 1, p. 2; Tr. 1241–42, 1655). According to Dr. Forsman, his last week at work was Childs' first week at work (Alachua Remand Exhibit 1, p. 2). Dr. Forsman stated that during that week, he spent parts of two or three days with Childs explaining to him what his responsibilities would entail, including the maintenance of the corporate checkbooks for YAC and YAS, the preparation and filing and making payments on the Forms 940 and 941 (Alachua Remand Exhibit 2, p. 2; Tr. 1265–66, 1269, 1769–72). According to Childs, it was Forsman and not Dr. Forsman who instructed him as to these duties and responsibilities. Childs testified that Dr. Forsman was out of town when he arrived at Young American (Tr. 1257, 1265–66, 1269–71, 1354–55, 1360, 1380–81). Forsman denied giving any detailed instructions to Childs concerning Childs' duties at Young American (Tr. 1656–63).

17. The cash flow problem at Young American was serious and continuing and payments were not made to IRS in a timely manner (Tr. 1291). Forsman was aware of this (Tr. 1291). Thus, Forsman established priorities as to payments (Tr. 1323–24). In Childs' case, Forsman stated that Childs was to pay the bills absolutely necessary to keep the doors open (Tr. 1324, 1326–28, 1330–31 and 1391–94). As a result, the weekly and monthly IRS payments were not made and it was not until the quarterly payment became due that the IRS payment became a "priority" payment (Tr. 1323, 1329, 1333, 1335–36 and 1393–94). According to Childs, he spoke to Forsman four to five times daily concerning business (Tr. 1379). Also, Childs testified that he was absolutely certain that Forsman was aware that payments to the IRS were not being timely made because Childs personally informed Forsman at the time (Tr. 1291, 1312, 1325–26, 1328, 1337, 1339–40, 1344). In addition, Childs claims he told Forsman about the failure to make IRS payments in monthly reports (Tr. 1387–88). Childs states he was never admonished because the IRS payments were not timely filed (Tr. 1395). Childs testified that when he left Young American, he had a good relationship with Forsman and that Forsman had never indicated that Childs was doing a bad job[3] (Tr. 1377, 1380, 1383).

18. When Dr. Forsman returned to Young American at the end of 1976, his functions were more limited than they had been previously. Dr. Forsman was responsible for the payroll checking account and he wrote the payroll checks and delivered them to Childs, or, to Childs' successor, Riley, along with a notation of total amount which was to be taken from the general checking account and deposited into the payroll account. Beginning with the last quarter of 1976, Dr. Forsman was also responsible for preparing and

[3] Childs testified that he left voluntarily to enter the law enforcement field (Tr. 1308).

signing IRS Forms 941. He would complete the forms, except for Lines 20 and 21, sign them and deliver them to Childs. Line 20 reflects the total deposits of Form 941 taxes which have been made during the quarter, and Line 21 reflects the balance of the Form 941 taxes due to the IRS. This procedure was followed because Dr. Forsman had not managed the checkbook during the period of his absence and Dr. Forsman left those lines blank, to be filled in by Childs, whose responsibility it had been to make the deposits[4] (Alachua Remand Exhibit 2, pp. 2–3; Tr. 1286, 1440).

19. Dr. Forsman, also during the period after his return in 1976, filled out the computer-printed IRS tax deposit forms which were used with Form 941 tax deposits during the course of the quarter. These deposits were to be made at a local bank. Dr. Forsman calculated the amount due and inserted that amount on the card. The card was then delivered to Childs, whose responsibility it was to issue a check making the appropriate payment to the IRS (Alachua Remand Exhibit 2, p. 3).

20. Forms 941 for YAC bearing the following dates were filed with the IRS by either Dr. Forsman or Childs: March 31, 1975, July 15, 1975, October 15, 1975, January 14, 1976, April 14, 1976, July 14, 1976, October 5, 1976, January 28, 1977, April 21, 1977, July 28, 1977, October 17, 1977 and January 31, 1978 (Alachua Remand Exhibit 3, pp. 1–18; Tr. 1783, 1787–88).[5]

21. Forms 941-M for YAC were filed by Dr. Forsman for the months ending January, March and April, 1978 (Alachua Remand Exhibit 3, pp. 19–21, Alachua Remand Exhibit 4).

22. Forms 941 for YAS bearing the following dates were filed with the IRS by either Dr. Forsman or Childs: March 31, 1975, July 15, 1975, October 15, 1975, January 14, 1976, April 14, 1976, July 15, 1976, October 5, 1976, July 28, 1977 and January 30, 1978 (Alachua Remand Exhibit 5, pp. 1–8, 10–17).

23. Forms 940 for calendar year 1975, 1976 and 1977 were filed on behalf of YAC.[6] Form 940 for calendar year 1976 was filed on behalf of YAS. Form 940 for calendar year 1976 was also filed on behalf of J&M (Alachua Remand Exhibits 6 and 7).

24. Riley replaced Childs in August, 1977 and assumed responsibility for much of the financial management of Young American. Riley remained in this position until January, 1978. During the Riley

[4] Dr. Forsman's signature and certification on Form 941 was under penalty of perjury that the form was complete when he signed his name (Tr. 1782–85, Alachua Remand Exhibit 3, pp. 14–16).

[5] According to the IRS, no record of 941 forms for the quarters ending June 30, September 30 and December 31, 1978 could be located (Alachua Remand Exhibit 8, p. 17).

[6] Form 940 for 1978 could not be located by the IRS (Alachua Remand Exhibit 8, p. 22.

period, Dr. Forsman retained the responsibility for completing and signing the Form 941 (Alachua Remand Exhibit 2, p. 3; Tr. 1439).

25. It is Riley's testimony that during the period he maintained the YAC books, payments to the IRS were not always made on time (Tr. 1440–41). Riley states that when this occurred, it would be discussed with both Forsman and Dr. Forsman (Tr. 1440–41). Cash flow problems continued to be the cause of delinquent payments to the IRS (Tr. 1444–45).

26. Riley stated that he would prepare a monthly list of payables for Forsman which would include money owed to the IRS (Tr. 1442). Riley further stated that the cash flow problem was well known to Forsman and Dr. Forsman and he discussed with both men his inability to pay current bills (Tr. 1453–55). It is Riley's testimony that the failure to pay the IRS was specifically discussed with Forsman (Tr. 1461). On a monthly basis, Forsman would review all payables, including the money due the IRS with Riley so that Forsman was fully aware of the IRS problem (Tr. 1455, 1461, 1465–69).

27. It is Forsman's testimony that any decision not to pay the IRS in a timely manner was the decision of Childs (Tr. 1658) and Forsman never discussed priorities with Childs (Tr. 1664). Forsman stated that Childs never brought the IRS problems to his attention (Tr. 1665–66) and that he never had any direct or supervisory responsibility over the payments to the IRS (Alachu-Remand Exhibit 1, p. 3).

28. It is Forsman's testimony that he first became aware of the problems with IRS in mid-1977 (Alachua Remand Exhibit 1, p. 4). Forsman's first knowledge of the IRS problem was during a meeting at the IRS office in Gainesville, Florida with IRS Agent Peter M. Dobbins on September 8, 1977. Riley was with Forsman on this occasion. At this meeting, Forsman signed an IRS Installment Agreement for YAC (Alachua Remand Exhibit 1, p. 4). The IRS placed two liens against YAC for delinquent tax payments on September 16 and October 24, 1977 (Alachua Remand Exhibit 1, p. 5). It appears that during July, 1977 and perhaps other times during this period, the IRS had sent letters or a letter to Young American about an irregularity in its 940 or 941 returns. It is Forsman's testimony that he has no recollection of ever seeing such communications until he began to prepare for this proceeding (Alachua Remand Exhibit 1, p. 4). It is Forsman's position that while he conducted the day-to-day business affairs of YAC and YAS, the authority with respect to the payment of all bills was delegated to Dr. Forsman, Ralph Childs and James E. Riley and the three individuals had the final word on what bills of YAC and YAS would be paid (Alachua Remand Exhibit 1, p. 3).

29. Ralph Childs admits that although it was his responsibility to make weekly payments or deposits for the YAC Form 941 taxes,

he did not do so for the quarter ending December 31, 1976 (Tr. 1283–84, 1287). Rather, Childs wrote a single check in the amount of $4,226.77 dated February 2, 1977, for the payment of those taxes (Alachua Remand Exhibit 9, p. 15; Tr. 1283–84). Childs states that during the last quarter of 1976, Young American was experiencing cash flow problems and there were insufficient funds to satisfy the Young American current debts (Tr. 1291, 1309). Because of the insufficient funds, Childs did not write the weekly checks to the IRS for Young American's 941 taxes for the last quarter of 1976 (Tr. 1310). Childs states he informed Forsman of this fact (Tr. 1309). However, Childs could not recall whether he specifically advised Forsman each week, or any week, that the Form 941 payments were not being made (Tr. 1313).

30. Again for the quarter ending March 31, 1977, Childs prepared a single check in the amount of $4,658.22 dated April 27, 1977, for the payment of those taxes. Forsman signed this check (Alachua Remand Exhibit 3, p. 14, Alachua Remand Exhibit 14, Alachua Remand Exhibit 30, p. 99; Tr. 1321–22, 1621). This check was not accepted by the bank and IRS sent YAC a "Notice of Check not Accepted by Bank" (Form 2287). The notice requested payment by certified check, cashier's check or money order. Subsequently, these taxes, plus penalties and interest became the subject of the September 16, 1977 tax lien (Alachua Remand Exhibit 2, p. 5, Alachua Remand Exhibit 8, p. 1, Alachua Remand Exhibit 14, Alachua Remand Exhibit 30, p. 99; Tr. 1621).

31. According to Childs, Young American continued to experience cash flow problems which required that priorities[7] be given to various obligations. Such priorities changed from day-to-day. The test was to pay those bills necessary to keep the business operating, for example, COD payments for merchandise, utilities, telephone and other day-to-day items. Childs said payments to IRS were priority items, but, they were not given the highest priority until the quarterly Form 941 payments became due. Childs stated that the non-payment of the 941 taxes during the quarter was necessary to keep the doors to the business open, i.e., he would not have been able to pay other outstanding bills. Childs states that he and Forsman discussed these priorities on several occasions, and that Forsman was informed by Childs on more than one occasion that Young American did not have sufficient funds to pay the IRS and that Forsman was informed throughout the tax quarter that the weekly IRS payments had not been made (Tr. 1322–29, 1339–41, 1343–44, 1351–53, 1384–85, 1391–94). Childs was never admonished by Forsman for not making the payments to IRS (Tr. 1395). However, Childs

[7] Terms such as priorities, door closers and door openers have approximately the same meaning, i.e., use available cash to pay only such bills as are necessary to avoid the business being shut down.

was never told not to make the payments to IRS Forsman (Tr. 1244, 1311).

32. Forsman denied having any discussions with Childs with respect to the priorities in which Young American obligations were to be paid (Tr. 1659, 1664). Forsman also denied that Childs ever brought to his attention the fact that Young American did not have sufficient funds with which to pay the IRS (Tr. 1665–66). It is Forsman's position that if late tax payments were made to IRS by Young American, it was Childs' decision, not his. In January, 1978, YAC and YAS closed the business (Tr. 1453).

Great Southern Music Hall

33. Great Southern Music Hall (GSMH) was a corporation which operated a multi-purpose entertainment center at Gainesville, Florida. Using a defunct movie theater, an entertainment center was fashioned including a small concert hall, a theater, a restaurant, a bar and amusement areas (Alachua Remand Exhibit 1, p. 5). GSMH began operation in 1974 and was the idea of Forsman, who was Vice-President, Director and 33% stockholder (Alachua Remand Exhibit 1, pp. 5–6). Forsman also arranged the original and subsequent financing, promoted the music hall, oversaw the physical plant and was involved in decisions on personnel, promotion, decor and entertainment (Alachua Remand Exhibit 1, p. 5). Forsman was the GSMH director most involved in the day-to-day operation and was viewed as the Chief Operating Officer of this company (Tr. 1530; Country Remand Exhibit 4, para. 7). However, at this time, 1974, Forsman's "primary endeavor" was Young American and he approached GSMH as a part-time responsibility (Alachua Remand Exhibit 1, p. 5).

34. Forsman retained his interest in GSMH until October, 1978 at which time he sold his stock interest and severed all other relationships with the corporation. At various times during this period, while Forsman held an interest, Jeffrey Meldon, Peter Laird and George Elmore also held an interest in the corporation. Meldon, Laird and Elmore were also officers and directors of GSMH. Harvey Budd, a certified public accountant, was a Director of GSMH. Michael Bryant, an attorney was an officer and director of GSMH. Neither Budd nor Bryant held any stock in GSMH (Alachua Remand Exhibit 1, pp. 6–7, Alachua Remand Exhibit 31; Tr. 1600, 1794–95, 1802).

35. Meldon drafted corporate papers, prepared annual reports to the Florida state government and counseled GSMH on legal and tax matters. He is a full-time attorney in private practice at Gainesville. He worked with GSMH matters on a part-time basis as time permitted, sharing the legal responsibilities with Bryant, another attorney/principal (Alachua Remand Exhibit 1, p. 7).

36. Bryant, who is a full-time attorney practicing in Gainesville,

called meetings, kept books and provided legal counsel to GSMH. He was President of GSMH from early 1974 to June, 1980 but between 1974 and 1980, Bryant held no stock in GSMH (Alachua Remand Exhibit 1, p. 7, Alachua Remand Exhibit 31; Tr. 1794–95).

37. Laird, another full-time practicing attorney in Gainesville, was responsible for booking movies into the GSMH theater and for working on a cash flow analysis for the corporation. He moved to California in 1976. Budd did not take an active role in managing the corporation and Elmore was a "passive" investor in GSMH (Alachua Remand Exhibit 1, p. 7).

38. The regular financial records of GSMH consisted of payroll records, checkbooks and daily income reports. The responsibility for maintaining these records belonged to William H. O'Byrne, Ralph Childs and James D. Riley, Sr. (Alachua Remand Exhibit 1, p. 7). O'Byrne worked for GSMH as bookkeeper and general manager from 1974 to February, 1977. In addition to keeping the financial records, O'Byrne oversaw the entire operation of the Music Hall, including personnel, maintenance, purchasing and merchandising (Country Remand Exhibit 4, p. 2; Tr. 1512, 1573). Childs worked for GSMH as bookkeeper from January, 1977 through the end of August, 1977 (Tr. 1236–37, 1341, 1376–77). Riley worked for GSMH from July, 1977 to September 30, 1978 (Tr. 1428, 1447).

39. Forsman did not have the responsibility for keeping the books and records of GSMH. On occasion, Forsman reviewed "daily income statements", which were daily reports compiled by the manager showing the income of GSMH. It is not Forsman's general practice to review the checks and payroll records of GSMH (Alachua Remand Exhibit 1, pp. 7–8; Tr. 1601, 1719).

40. Forsman, Meldon, Laird, Bryant, O'Byrne and Riley were authorized to sign checks for GSMH. Normally, the comptroller of the corporation would write and sign all checks for routine payment of regular accounts. Officers of GSMH were also authorized to write checks in order to enable them to handle unusual situations, or instances in which the comptroller was absent (Alachua Remand Exhibit 1, p. 8). In the routine operation of GSMH, the authority to direct or control the payment of funds was held by O'Byrne, Childs and Riley, in succession (Alachua Remand Exhibit 1, p. 8). According to Forsman, as an officer and part owner of GSMH, he held this authority in a technical sense only (Alachua Remand Exhibit 1, pp. 8–9).

41. Forms 941 for GSMH bearing the following dates and signatures were filed with the IRS:

April 1, 1975	Bonnie Savant[8]
July 21, 1975	O'Byrne

[8] She signed this form as "Secretary" (Alachua Remand Exhibit 16, p. 1; see also Tr. 1550, 1677).

October 30, 1975	O'Byrne
January 28, 1976	O'Byrne
April 27, 1976	O'Byrne
August 5, 1976	(See paras. 55 and 56, *infra*)
April 28, 1977	Forsman
July 26, 1977	Childs
November 8, 1977	Riley
January 31, 1978	Riley
April 19, 1978	Riley
July 11, 1978	—

Two additional Form 941s were filed by GSMH for the tax periods ending September 30 and December 31, 1976. These forms were filed unsigned and undated and were received by the IRS on February 11, 1977 (Alachua Remand Exhibit 16, pp. 1–14, Alachua Remand Exhibit 17, pp. 3–6; Tr. 1622–24).

42. Forsman signed the Form 941 for the tax period ending March 31, 1977 (Alachua Remand Exhibit 16, p. 11). Forsman stated that this form was prepared by the comptroller for his signature and that he was told by the comptroller that the information on the form was correct. According to Forsman, he did not personally prepare this form (Alachua Remand Exhibit 1, p. 8).

43. GSMH also filed Forms 941-M for the months ending January, February, March, April, May, June, July, August, September and October, 1978. All but the April and May forms bear the signature of Riley. The April and May forms were undated and unsigned and were both received by the IRS on July 18, 1978 (Alachua Remand Exhibit 16, pp. 15–24, Alachua Remand Exhibit 17, pp. 1–2).

44. Forms 940 for calendar years 1977 and 1978 were filed on behalf of GSMH. These forms were signed by Riley (Alachua Remand Exhibit 18).

45. The "issuance" of checks to the IRS for tax payments was the responsibility of O'Byrne, Childs and Riley. Forsman did not have this general responsibility (Alachua Remand Exhibit 1, p. 8). Although Childs did not have the authority to sign checks on behalf of GSMH, he prepared checks for Forsman's signature (Tr. 1238, 1366). Checks to or on account of the IRS bearing the following dates and in the amounts shown were signed by Forsman:

June 28, 1977	$1,278.12
June 28, 1977	$1,283.20
July 25, 1977	$1,298.54
July 25, 1977	$1,510.74
August 1, 1977	$ 500.00
March 2, 1978	$3,026.83
March 14, 1978	$1,000.00

(Alachua Remand Exhibit 25, pp. 7–12, 19–20).

46. According to Forsman, in the latter part of 1976, at or about

the time O'Byrne handed in his resignation from GSMH, he (O'Byrne) advised the Board of Directors that GSMH owed tax money to the IRS. However, O'Byrne did not have available a complete accounting of these obligations (Tr. 1646–47, 1651–52). In January, 1977, O'Byrne presented a report to the Board of Directors containing a list of GSMH's accounts payable (Tr. 1647). Thus, Forsman stated that, although there was a general awareness in late 1976 that a problem existed, the Board did not know the exact amount of money involved until 1977 (Tr. 1726). In addition, in late December, 1976 or early January, 1977, according to Forsman, O'Byrne first made the officers of GSMH aware that tax forms had not been filed in a timely manner (Tr. 1692).

47. According to O'Byrne,[9] GSMH began to have problems with Form 941 as early as 1975 (Alachua Remand Exhibit 4, p. 2). O'Byrne believed that GSMH timely filed the Form 941, but failed to remit the taxes due. O'Byrne stated that he told the Board of Directors, including Forsman, of that fact (Tr. 1524–25). According to O'Byrne, GSMH, at that time, was not doing well financially. The corporation was suffering "huge operating losses" and paid whoever had to be paid to keep the doors to the Music Hall open. O'Byrne stated: "We had to pay the rent, pay the employees. We could always let the IRS slide for awhile". (Tr. 1521).

48. O'Byrne explained that based upon his experience at GSMH, when the IRS realized a taxpayer like GSMH had not paid its taxes it sent a letter demanding payment. If the taxes remained unpaid, the IRS sent another letter giving the taxpayer 30 days in which to pay or the matter would be put into collection. This was known as a "30-day letter." The IRS then sent another letter stating that the taxes must be paid within 10 days or the matter would be put into enforcement. This was known as a "10-day letter." At that time, the taxpayer usually received a telephone call from the local IRS office. If no response was received by the IRS to the 10-day letter, a lien letter was sent stating that if the taxes were not paid within 10 days, a lien would be filed. Before that 10 days expired, the taxpayer received a visit from an IRS field agent (Tr. 1519–20).

49. There was at least one meeting with representatives of the IRS in the latter part of 1975 at which both Forsman and O'Byrne were present. However, there are different versions of what took

[9] Although Mr. O'Byrne was called to support Country's direct case, he did so under subpoena and in response to an Order of the U.S. District Court for the Northern District of Florida and following the obtaining of a grant of immunity from personal self-incrimination pursuant to Title 18 USC 6004 (Tr. 1508–09; Order FCC 80M-2524, released December 5, 1980; Memorandum Opinion and Order, FCC 80M-1818 released September 26, 1980). As a result, Mr. O'Byrne was designated as an advsere witness to Country (Tr. 1511). In addition, O'Byrne testified that Roy Kinsey, Alachua's President, Director and other 45% owner was his primary source of income at this time (Tr. 1516).

place at the meeting. The procedures outlined in paragraph 48 had taken place before this meeting. According to O'Byrne, both O'Byrne and Forsman met with IRS Agent A.E. Davis. It is O'Byrne's version that Forsman was in the meeting with the IRS agent the whole time. This belief is supported by O'Byrne's knowledge that an IRS agent will not conduct an interview with a corporation about a tax problem unless an officer of the company is present at such a meeting and O'Byrne was not an officer. According to O'Byrne, both he and Forsman were fully appraised of the tax problem by IRS Agent Davis. O'Byrne stated this tax problem was cleared up promptly and that Forsman offered no resistance to paying the taxes due (Tr. 1517–20, 1523–24, 1536–37, 1545–48, 1602–03, 1679–80 and 1703).

50. According to Forsman, he had no contemporary knowledge of the nature of the 1975 IRS problem (Alachua Remand Exhibit 1, p. 9). Forsman stated that he was called into O'Byrne's office, that the IRS agent was there, that Forsman was told GSMH owed approximately $5,000 in taxes and that O'Byrne verified the IRS' calculations. Forsman said he suggested and the IRS agent agreed, to pay these taxes the next week (Tr. 1602–03, 1684, 1703). Forsman did not know why the taxes had not been paid earlier and he thought it was an "oversight" on the part of O'Byrne. Forsman further stated that O'Byrne did not contemporaneously advise either the Board of Directors or Forsman that the tax money was due (Tr. 1685–86).

51. Prior to Forsman's testimony in this remand proceeding (Tr. 1602–03, 1679–80, 1703), Forsman testified in the prior proceeding (Tr. 550–53), in sworn statements in response to interrogatories (Bureau Remand Exhibit 3 at para. 10, Ans. 15(a)(i) and p. 22, Ans. 44) and exchanged testimony (Alachua Remand Exhibit 1 as originally exchanged), that he had no knowledge of the nature of the problem. It was not until O'Byrne testified at the hearing that Forsman recalled the 1975 meeting including the name of IRS Agent Davis (Tr. 1602–03, 1679–80, 1703). Also, Forsman had testified earlier that he had no recollection or knowledge of a tax lien being placed against GSMH Delicatessen, in response to both Bureau and Country interrogatories, Forsman now states the 1975 tax problem could have been the result of the delicatessen operation (Bureau Remand Exhibit 3 at p. 10, Ans. 15(a)(i) and p. 22, Ans. 44).

52. A federal tax lien was filed by the IRS against GSMH on October 15, 1975. The lien specified an unpaid balance totalling $5,456.01 for Form 941 taxes owed for the tax period ending June 30, 1975. A release of this lien was filed on March 19, 1976 (Alachua Remand Exhibit 28, pp. 1–2). Forsman stated that he did not know that a lien had been filed (Tr. 1684). After the late 1975 meeting with IRS, O'Byrne stated that GSMH handled its tax matters correctly in that all tax forms and payments for the last quarter of 1975 and the first quarter of 1976 were filed and paid on time (Tr. 1525, 1550). However, O'Byrne stated that by the end of the second quarter for

1976, GSMH "got real tight for cash . . ." The tax forms were timely filed but no payment was made on the $8–10,000 then due. Rather, GSMH reverted to taking advantage of the IRS regulatory lag, i.e., the 30- and 10-day letter notices (Tr. 1525).

53. In the last few months of 1976, according to O'Byrne, the IRS realized that GSMH had not paid its taxes for the second quarter of 1976. An IRS agent again called at the corporation on October 14, 1976 in an attempt to collect the taxes (Tr. 1737–38). At this time, the IRS agent was given a check for $11,037.95, which covered GSMH's Form 940 taxes for the fourth quarter of 1975 and the second quarter of 1976, plus interest and penalties. At this meeting, according to O'Byrne, both O'Byrne and Forsman were present during the visit by the IRS agent (Tr. 1537–38, Alachua Remand Exhibit 25, p. 7; Tr. 1589–90).

54. Forsman stated he did not recall the 1976 meeting with the IRS. Forsman said he knew O'Byrne had written a "large" check to the IRS, i.e., one that was greater than $5,000, but he did not know the specific amount of the check until he began preparation for this hearing (Tr. 1681–83, 1688, 1705, 1709). Forsman said the fact that GSMH owed a large amount to the IRS was not surprising to him as GSMH owed hundreds of thousands of dollars and the tax money involved did not seem significant to him (Tr. 1703–04). Forsman testified that he did not question O'Byrne as to the size of the $11,000 payment to the IRS (Tr. 1705), even though he had initially planned on using those funds for capital improvements (Tr. 1688–89).

55. The GSMH Form 941 for the tax quarter ending June 30, 1976 is dated August 5, 1976 which bears the handwritten signature "James Forsman" "Owner" written in the spaces on the form for the signature and title. Forsman said the handwriting was not his and he did not sign the form (Alachua Remand Exhibit 1, p. 8). O'Byrne admitted that he signed this form with Forsman's name as the owner of GSMH. O'Byrne had decided that he could no longer sign Forms 941 on behalf of GSMH as he was afraid he could be held personally liable for the taxes due IRS but not paid. Thus, according, to O'Byrne, he prepared the Form 941 for the second quarter of 1976 and gave it to Forsman to sign. Forsman, again according to O'Byrne, said he was not going to sign any tax forms so O'Byrne signed Forsman's name to the form (Tr. 1540–41, 1557–59). However, according to Forsman, there was no discussion with O'Byrne about the form (Form 941) and O'Byrne did not bring the form to him prior to its being filed and O'Byrne never asked Forsman to sign the Form 941 (Tr. 1602). It is Forsman's testimony that he never refused to sign any IRS forms that were presented to him by O'Byrne (Tr. 1720). O'Byrne admitted that he did not timely file the GSMH Form 941 for the third and fourth quarters of 1976. He said he did this because GSMH had no funds to pay these taxes and "if you don't file the return, they [the IRS] have to catch up with their own inefficiency

before they know you haven't paid the money." (Tr. 1556) O'Byrne stated that Jeffrey Meldon, a member of the GSMH Board of Directors, in a hallway conversation after a Board of Directors meeting in July or August, 1976, told him (O'Byrne) not to file the Forms 941 in order to take advantage of the IRS' inefficiency (Tr. 1554–57, 1584).

56. O'Byrne further testified that at the time he prepared the Forms 941 for the third and fourth quarters of 1976, he asked the GSMH officers to sign them (Tr. 1560). Forsman denied that he refused to sign IRS forms presented to him by O'Byrne (Tr. 1720). Forsman stated that he was not aware that these two forms had not been filed earlier (Tr. 1647–48). It is O'Byrne's position that he did have discretion and authority at GSMH to decide which bills to pay. But while he had the authority to pay IRS, he did not have the required funds. Thus, O'Byrne stated that he would have lost his job if he had paid the IRS (Tr. 1562–63). O'Byrne explained:

> The business would have shut down. The place would have been dark. It would have no power. In other words, my instructions from the Board of Directors were to keep the doors open, and that entails keeping the power turned on and keeping liquor on the shelf and keeping employees in the place . . . . [My] first priority of payments were the people that could close the door—the landlord, utilities, the employees, the product for resale.

(Tr. 1564; see also Tr. 1567–68).

An example of the need to avoid so-called "door closers" is found in the State of Florida laws with respect to sale of wholesale liquor. Once GSMH ordered liquor from the wholesaler, the state acted as the collection agent for the wholesale vendor, and gave 10 days from the invoice date to pay the bill, or, have its liquor license suspended. Nevertheless, according to O'Byrne, even these bills were paid late, but never by more than two or three days (Tr. 1521–22). Michael L. Bryant, a member of the Board of Directors of GSMH stated he could recall no question about the corporation's liquor license being revoked for non-payment of its wholesale liquor bills (Tr. 1830).

57. Again according to O'Byrne, the Board of Directors met at least monthly on a non-scheduled basis during the first half of 1976. However, with the financial problems, the Board met more frequently, sometimes two or three times a week (Tr. 1575). During the last six months of 1976, O'Byrne estimated the Board met eight or twelve times. O'Byrne stated he was present at each of these meetings (Tr. 1575, 1577). At the 1975 and 1976 Board of Directors meetings, which O'Byrne attended, he submitted and gave a report at such meetings of accounts payable and funds available. O'Byrne's list was in no particular order or format but he could not show up at a Board meeting without such a list (Tr. 1575). O'Byrne stated that IRS was "almost always" on the list of payables (Tr. 1565, 1575–76). According to O'Byrne, the Board spoke of the IRS as "the problem" (Tr. 1576). During the Board meetings, according to O'Byrne, he was

advised which bills to pay in various ways. Sometimes he was told to pay "regular household bills", i.e., bills required to keep the doors open such as the electrical bill and rent. Other times the Board would help O'Bryne decide which bills to pay and which bills to be delayed. O'Byrne stated that Forsman was present at all such meetings (Tr. 1564–65). O'Byrne could not recall ever having been told not to pay the IRS at a Board of Directors meeting, but he was placed in a position where if he paid the bills the Board instructed him to pay, he could not pay the IRS (Tr. 1586). It is O'Byrne's testimony that he "personally presented" the reports, i.e., the lists of accounts GSMH owed money, to Forsman (Country Remand Exhibit 4, p. 3; Tr. 1530) and that both he (O'Byrne) and Forsman would go through the listing of accounts payable and decide whom to pay (Tr. 1526–28). O'Byrne states that both he and Forsman knew how much money was available and the list of payables was reviewed with that in mind (Tr. 1528–29) and that when the available funds were exhausted, both knew that no further bills could be paid (Tr. 1527). O'Byrne was able to "swear" that Forsman never told him not to pay the IRS (Tr. 1548, 1526). But, O'Byrne does state that Forsman knew the IRS was listed on the accounts payable list, knew the taxes were unpaid, yet never told him to pay the IRS (Tr. 1526–27).

58. O'Byrne denied that he, of his own volition, ever made the decision not to timely make payments to the IRS or not to timely file any of the tax forms in question on behalf of GSMH (Country Remand Exhibit 4, p. 4; Tr. 1568, 1584). All such decisions, according to O'Byrne, were made by the Board of Directors, which included Forsman (Country Remand Exhibit 4, pp. 3–4).

59. Forsman denies that the Board of Directors received any list of accounts payable as described by O'Byrne prior to 1977. Forsman said that during the last part of 1976, the Board requested many times that O'Byrne furnish it with a list of accounts payable, but, O'Byrne produced such a list only "occasionally", perhaps every six months (Tr. 1648–49, 1652, 1689–90, 1696, 1710–11, 1728). Forsman states that during 1976, he and the Board of Directors received and reviewed only partial lists of accounts payable (Tr. 1710, 1712–13, 1715). These partial lists of bills were prepared by O'Byrne or a secretary and contained the "worst thing[s]" (Tr. 1710). Forsman said that " . . . there were informal, little pieces of paper that went around, or conversations that would indicate certain bills that needed to be paid" but he could recall no mention of IRS obligations on these listings (Tr. 1711, 1715). Forsman stated that he could not understand how O'Byrne could have claimed to have placed the IRS obligations on the accounts payable list when O'Byrne did not complete the forms for the last two quarters of 1976 until January, 1977 (Tr. 1711).

60. The record shows that O'Byrne was away from the GSMH from September or October, 1976 through December. During this

period of time, GSMH was building a similar franchise GSMH at Orlando, Florida and O'Byrne was responsible for setting up the business and supervising the construction. When this project was first started, he spent seven days a week at Orlando. Thereafter, he spent two days a week at Orlando, usually Tuesday and Thursday (Tr. 1550–51, 1747–48). Forsman acknowledges that during this period O'Byrne was spending "considerable time" in Orlando, (Tr. 1721–22). In addition, the GSMH was experiencing "tremendous growth" and O'Byrne was involved with that and thus Forsman admits that O'Byrne was overworked (Tr. 1720) and overlooked "his real job" which was doing the accounting work for GSMH (Tr. 1653). Forsman stated: " . . . I think he just didn't do it." (Tr. 1653). It was also Forsman's testimony that O'Byrne did not provide GSMH with any accounting for the last six months of 1976. Rather, such accounting was finished in January, 1977 (Tr. 1644–45). Forsman denies that either he or the Board of Directors ever instructed O'Byrne not to file IRS forms or pay FICA and withholding taxes in a timely manner. Forsman states that O'Byrne did this on his own without direction from the officers or directors of GSMH and that O'Byrne must have noted the financial problems of GSMH but this would have nothing to do with the timely filing of the IRS forms (Tr. 1649–52, 1714, 1717).

61. Michael L. Bryant was a witness in this proceeding and he was a member of the Board of Directors of GSMH from June, 1974 to June, 1980 (Alachua Remand Exhibit 31; Tr. 1791–1834). Bryant stated that he attended virtually every meeting of the Board of Directors during the period he was a member (Tr. 1795–96). Bryant stated that the Board did not receive "comprehensive" financial reports on the business activities of GSMH during the last half of 1976, until an informal annual report for 1976 was produced in February, 1977 (Alachua Remand Exhibit 31, p. 1). By "comprehensive", Bryant meant monthly profit and loss statements, monthly balance sheets and a year-end summary (Tr. 1806–07). Bryant stated that he had telephone O'Byrne on a number of occasions during his tenure to inquire as to the whereabouts of the monthly profit and loss statements for GSMH. According to Bryant, O'Byrne would promise such reports by a deadline which was missed and he would explain that he had other duties and insufficient time to prepare the reports (Alachua Remand Exhibit 31, p. 2). Thus, at no time prior to late 1978 did the Board see regular monthly profit and loss statements within 30 days from the end of an accounting period for more than two months at a time (Alachua Remand Exhibit 31, p. 1).

62. However, Bryant did recognize that although "comprehensive" reports were not received, there were some reports on the business activities of GSMH which were prepared by O'Byrne (Alachua Remand Exhibit 31, p. 1; Tr. 1806–07). Thus, Bryant did see profit and loss statements from "time to time" and he received

balance sheets and lists of payables "from time to time" (Tr. 1805). Bryant recalled that IRS was among the list of payables "on at least some of the documents", and the IRS was on more than one of the creditor lists that he saw (Tr. 1805, 1809). Bryant did not know if the IRS was "continually" one of the listed creditors of GSMH (Tr. 1809). During Bryant's association with GSMH, he conferred with Forsman and O'Byrne "dozens" of times (Alachua Remand Exhibit 31, p. 1; Tr. 1797–98). During such conversations, at one time or another, virtually every aspect of the business affairs of the corporation was discussed (Tr. 1798). Many of such discussions did involve creditors of GSMH and "certainly the IRS would have been one of those creditors [discussed] . . . " (Tr. 1799). Bryant stated that O'Byrne came to Board meetings as a "resource person" and would respond to inquiries by Board members (Tr. 1810) and at such meetings the Board would question O'Byrne as to the current status of GSMH with respect to its creditors, including the IRS (Tr. 1814). The Board would review the list of payables as submitted by O'Byrne and would give O'Byrne its "advice" as to how to discharge the debts of the corporation as well as "general instructions" as to how O'Byrne should deal with new monies coming to the corporation and O'Byrne "would take it from there" (Tr. 1810–11). The Board also gave general instructions to O'Byrne as to the priority in which creditors were to be paid (Tr. 1811). Byrant stated that the high priority items were taxes, rent, utilities and liquor, i.e., the so-called "door closers". Low priority items were suppliers (other than liquor), repairmen, construction workers, advertisers and movie companies (Tr. 1828–29). The Board, according to Bryant, knew there were times when there were insufficient funds even to pay the so-called "door closer" bills. When this happened, it was "dumped back in the lap of the bookkeeper" with the general instructions outlined above. As far as Bryant was personally concerned, he expected O'Byrne "to juggle things and pay them with the priorities that [the Board] had given him [as] . . . best [as] he could" (Tr. 1831–32). According to Bryant, whenever the subject of IRS payments was brought up at a Board meeting, such payments, i.e., withholding and FICA payments, were afforded the highest priority among the list of payables (Alachua Remand Exhibit 31; Tr. 1809–10, 1815, 1828). However, Forsman testified that the Board never told O'Byrne to pay the IRS first (Tr. 1730–31). Bryant agrees with Forsman to the extent that the Board never told or ordered O'Byrne to pay IRS before any other creditor (Tr. 1827–29). Rather, the Board took steps to insure that payments to the IRS and other priority items were being made (Tr. 1811–13).

63. Bryant could not recall that the Board ever gave an instruction to O'Byrne not to pay IRS or that he should withhold IRS withholding and FICA obligations of GSMH (Alachua Remand Exhibit 31, p. 1; Tr. 1819). Similarly, according to Bryant, O'Byrne was never instructed by the Board not to file timely quarterly or

annual federal unemployment compensation returns (Alachua Remand Exhibit 31, p. 1). It is Forsman's position that it was not until he learned of an IRS problem at GSMH in late 1976 or early 1977 that he began to take a more active role in supervising the management of the Music Hall. He then began attempting to reduce costs in an attempt to reduce the operating budget for GSMH and he sought to generate income for GSMH. Forsman at this time, tried to examine more closely the payment of taxes and other obligations. But he still states he placed reliance on the comptrollers and other officers and directors and that the comptrollers were still delegated the authority to determine which creditors to pay and when to pay them. In addition to Forsman, some of the other GSMH principals began to contribute additional time to the corporation to deal with tax and other fiscal and management problems (Alachua Remand Exhibit 1, pp. 6–9). At this time, meetings of the owners of GSMH were more frequent and discussions were held on the general business condition and the tax problems with GSMH. The other owners of GSMH authorized Forsman to deal with IRS on behalf of the corporation to resolve the tax problem (Alachua Remand Exhibit 1, p. 6).

64. According to Forsman, he then spoke with IRS personnel in July, 1977 "and possibly several times before in that same year". He dealt with IRS Agents Peter M. Dobbins, Earl Davis and L. D. Mathis of the Gainesville office. Forsman said he spoke with these agents over the telephone and there was at least one face-to-face meeting. The purpose of the meeting was to find a means to resolve the GSMH tax problems (Alachua Remand Exhibit 1, pp. 9–10).

65. As a result of these meetings between Forsman and the IRS agents, Forsman signed on July 28, 1977 on behalf of GSMH an "Installment Agreement" (Form 433-D) and a "Proposed Assessment of 100 Percent Penalty" (Form 2751) dated July 27, 1977 (Alachua Remand Exhibit 1, p. 10; Alachua Remand Exhibit 20 and Alachua Remand Exhibit 21; Country Remand Exhibit 2). The Installment Agreement stated the amount of taxes owed was $33,256.84. This amount was assessed for the unpaid balance of Form 940 taxes due for the tax period ending December 31, 1976 and for the unpaid balance of Form 941 taxes due for the tax period ending September 30, 1976, December 31, 1976, March 31, 1977 and June 30, 1977. Pursuant to the Installment Agreement, GSMH agreed to pay this tax liability at the rate of $500 per week beginning August 1, 1977 and two payments of $3,000 each were required to be made September 1 and October 1, 1977. The Installment Agreement required that Forsman on behalf of GSMH execute the Form 2751, i.e., the proposed assessment of the 100 percent penalty (Alachua Remand Exhibit 21).

66. It is Forsman's belief that he signed the IRS Installment Agreement and Proposed Assessment forms as part of an arrange-

ment with the IRS to keep GSMH from being closed down and to permit GSMH to pay its taxes on terms it could tolerate financially. Forsman also believed that if GSMH failed to pay it would be the "business" that would be foreclosed for tax delinquencies (Alachua Remand Exhibit 1, pp. 10–11). It was Forsman's understanding that the IRS could recover unpaid GSMH taxes from the corporate officers, if IRS could determine that the officers were responsible for the non-payment. However, Forsman did recognize that by his signing the Proposed Assessment form, he became, in effect, a guarantor of the corporate liability and that IRS could collect from him personally the unpaid portion of GSMH's taxes, if any (Alachua Remand Exhibit 1, pp. 10–11). It was only because the IRS would not permit the GSMH to enter into the installment agreement for the payments of taxes that Forsman also "voluntarily" signed the Proposed Assessment form (Alachua Remand Exhibit 1, p. 11, Alachua Remand Exhibit 20). It is Forsman's belief that the IRS had made a determination that he was not the individual responsible for the failure of GSMH to remit its 940 and 941 taxes (Alachua Remand Exhibit 1, p. 11; Tr. 1606–07).

67. Two IRS tax liens were filed against GSMH subsequent to Forsman's signing of the Installment Agreement on August 8, 1977 and November 29, 1977. The August 8th lien specified an unpaid balance of $7,543.61 which included $567.44 due on 940 taxes for the tax period ending December 31, 1976 and Form 941 taxes in the amount of $6,976.17 for the tax period ending March 31, 1977. The November 29th lien specified an unpaid balance of $21,087.10 for Form 941 taxes for the tax periods ending September 30, 1976 ($11,780.41) and December 31, 1976 ($9,306.69). The August 8, 1977 lien was released on February 7, 1978. The November 29, 1977 lien was released October 12, 1978 (Alachua Remand Exhibit 28, pp. 3–6; Country Remand Exhibit 1, pp. 1, 3).

68. On November 7, 1978, after Forsman had severed his connection with GSMH, one additional lien was filed by the IRS which was for an unpaid balance of $5,651.37. This included Form 941 taxes from the period ending June 30, 1978 ($613.90) and Form 941-M taxes for the periods ending August 31, 1978 ($1,982.89) and September 30, 1978 ($3,054.58). (Alachua Remand Exhibit 1, p. 12, Alachua Remand Exhibit 28, p. 7). The record does not show if this lien was released. As of February 21, 1981, the Music Hall was still a "going concern" in Gainesville under the ownership of GSMH (Alachua Remand Exhibit 1, p. 6; Tr. 1598–99).

Issue 3 - Misrepresentation

69. Some background information is necessary to a consideration of this issue. After Judge Dennison had released his Initial Decision on the first proceeding (July 20, 1978), Country filed a petition to enlarge issues against Alachua on December 19, 1978. In support of

the requested enlargement of issues were attached copies of the September 16 and October 24, 1977 liens against YAC and the October 15, 1975, August 8, 1977 and November 29, 1977 liens against GSMH. It was Country's position that Alachua's failure to remit funds to the government (the wages withheld for income taxes and FICA) constituted a violation of both YAC and GSMH fiduciary responsibilities to the IRS and reflected adversely on Forsman's character qualifications.[10]

70. On January 31, 1978, Alachua filed its opposition to Country's petition to enlarge issues which included an affidavit of Forsman which stated in part "The failure to remit [taxes] was not brought to my attention contemporaneously with any of these events." Forsman's affidavit was a general denial of any knowledge or responsibility for any of the events which resulted in the tax liens and stated that the failure to remit the taxes was "directly contrary to company policy concerning both corporations in question."

71. Judge Dennison then issued a *Memorandum Opinion and Order*, FCC 78M-343, released March 6, 1978 which denied the petition to enlarge issues. Among other reasons, Judge Dennison stated that the hearings were held on January 9 through 13, 1978 and "the matter was fully explored at that time under the Rule 1.65 issue" (official notice taken). At the hearing before Judge Dennison, Forsman had testified under oath (Tr. 382–98, 544–52, 574–81, 623–35, 782–88) that problems concerning unpaid bills, improper accounting was never brought to the attention of the Board of Directors until a meeting held in January, 1977 (Tr. 381–82). Forsman further testified in the previous proceeding that upon first learning of these problems ". . .the general manager was terminated. ." (Tr. 383). Forsman also referred to this person as "the gentlemen that we let go in January [1977] because of the problems that we found out then. . ." and as "the gentlemen [sic] we let go in January"[11] (Tr. 552). Based upon such sworn testimony of Forsman, Judge Dennison stated as follows:

> However, upon learning of the situation Forsman took voluntary action to rectify the situation and reported this to the Commission. Accordingly, it must be concluded that Alachua violated Section 1.65 in this regard, but no character considerations are raised (Paragraph 128 of Judge Dennison's Initial Decision).

The Review Board in its remand of this proceeding wanted a further exploration of the tax problems (see *Country Broadcasting Company*, 71 FCC 2d 1222, 1223–25 (Rev. Bd. 1979)).

72. After the Review Board's remand of this case, both Country

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[10] Official notice is taken of the pleadings filed herein before hearing to the extent required to provide the background for the inclusion of Issue 3 in this proceeding.

[11] As will be seen, the general manager and gentleman referred to by Forsman in his prior testimony, is Mr. O'Byrne.

and the Bureau submitted written interrogatories to Alachua and Alachua filed responses (Bureau Remand Exhibits 1, 2 and 3).

73. The Bureau Interrogatories 15(a) and (b) read as follows:

> 15(a) When did James E. Forsman first become aware of the failure of (i) GSMH and (ii) YAC to remit federal withholding and FICA (Social Security) taxes to IRS?
>
> (b) Describe in detail the circumstances under which he first became aware of the failure to remit.

Alachua answered these interrogatories as follows:

> 15(a)(i). GSMH–Early 1977, perhaps February, There had been an earlier problem in 1975. Mr. Forsman did not know at the time what the nature of the problem was. He knew that a payment was made to IRS because of some federal tax matter. Mr. Forsman believed that the problems stemmed from Great Southern Delicatessen, which for a time operated independently within the Music Hall.
>
> 15(a)(ii). YAC–In the first half of 1977.
>
> 15(b)(i). GSMH–When Mr. O'Byrne left as comptroller, he made the officers aware that tax forms and tax monies had not been paid during his tenure as they should have been. They were told by O'Byrne that the IRS wanted the matter resolved. To Mr. Forsman's recollection, a telephone call ensued in which Mr. Forsman and an agent of the IRS discussed the need for further conferences and consultation.
>
> 15(b)(ii). YAC–Mr. Forsman believed it was a telephone call from IRS, but does not recall the date specifically.

(Bureau Remand Exhibit 2, pp. 10–11).

Country was seeking similar information by way of interrogatories addressed to Alachua.

> 44. When did James Forsman first learn of the failure of Great Southern Music Hall to remit FICA and income tax withholding funds?
>
> 45. When did James Forsman first learn of the failure of Young American Clothiers, Inc. to remit FICA and income tax withholding funds?

(Bureau Remand Exhibit 2, pp. 7–8).

Alachua answered these interrogatories as follows:

> 44. See Bureau No. 15(a)(i).
>
> 45. See Bureau No. 15(a)(ii).

(Bureau Remand Exhibit 3, p. 22).

Forsman answered the interrogatories in question and the answers were subscribed and sworn to by Forsman (Bureau Remand Exhibit 3, p. 27). It is this prior testimony of Forsman, his affidavits and the responses to interrogatories when compared to the affidavits of O'Byrne and the deposition of Childs and Riley (former bookkeepers for either GSMH or Young American) which are examined under this issue.

74. As stated above, Forsman stated that his tax and other problems were caused by a general manager whose services were terminated. Based on the time period involved (1976 and January,

1977) and Forsman's description of the duties of the general manager, it must be concluded that the person involved was O'Byrne (Tr. 382, 552). Forsman admitted at the remand proceeding that O'Byrne had not been fired by GSMH (Tr. 1653, 1702). This fact is corroborated by both O'Byrne (Tr. 1534) and Bryant (Tr. 1821–22).

75. On July 22, 1977, Forsman signed on behalf of GSMH an IRS form entitled "Report of Interview Held with Persons Relative to Recommendation of 100-Percent Penalty Assessments" (Form 4180) (Alachua Remand Exhibit 22). The Form 4180 was prepared for Forsman by Bryant and was typed by Bryant's secretary. Forsman considered this to be an important document and he read it before he signed it, but not thoroughly (Tr. 1631–32).[12] Question 15 and Forsman's answers on Form 4180 read as follows:

> Q. 15. Were meetings of any kind ever held by stockholders, officers, members, or other interested parties, regarding nonpayment of the tax liabilities?
>
> A. Yes.
>
> Q. (a) Date(s) of such meetings:
>
> A. May, 1976. Late January, 1977.
>
> Q. (b) Who was present?
>
> A. Board of Directors.
>
> Q. (c) What was discussed?
>
> A. Financial condition of the corporation including tax liability.
>
> Q. What decisions were reached?
>
> A. Past due taxes were ordered to be paid immediately.

(Alachua Remand Exhibit 22, p. 2).

Also relevant to a consideration of this issue are the previous findings concerning O'Bryne's and Bryant's versions of the events in question. Such findings are not here repeated but will be considered in the conclusions. It was brought out on the cross-examination of O'Byrne that he did have a criminal record. He was convicted of a misdemeanor in Indiana in 1979 on charges having to do with controlled substances and sentenced to six months for this offense. He was also charged with a crime in Florida in 1976, namely, "criminal misconduct, a misdemeanor." O'Byrne entered a guilty plea and was fined $100 (Tr. 1569–71).

Contingent Comparative Issue

76. In its *Memorandum Opinion and Order*, the Review Board

[12] There is a misnumbering on transcript pages 1631 and 1632. Page 1631 should be page 1632 and page 1632 should be page 1631.

directed the Presiding Judge on remand to make findings and conclusions on the contingent comparative issue.[13] Following are the Presiding Judge's findings of fact from the evidence adduced at the initial hearing held by Judge Dennison, and conclusions of law.

Findings of Fact

Maximum Diffusion of Control of the Media of Mass Communications

77. Neither Alachua nor any of its shareholders, officers or directors have or have ever had any other broadcast or other media ownership interests, nor are they or have they ever been an officer or director of any broadcast licensee or any other media entity (Alachua Remand Exhibit 18). Similarly, neither Country nor any of its principals have or have ever had any interest in any broadcast station or other media of mass communications (Country Remand Exhibits 1, 2 and 4).

Best Practicable Service to the Public

Integration of Ownership and Management

78. Mr. Roy E. Kinsey, Jr. is President and a Director of Alachua. He owns 45% of the company stock (Alachua Remand Exhibit 14). Mr. Kinsey will devote such time to the operation of the station as is necessary to fulfill his responsibilities as stockholder, corporate officer and member of the Board of Directors. He is not proposed to be integrated into the day-to-day operations of the proposed station (Alachua Remand Exhibit 9).

79. Mr. James E. Forsman is Secretary-Treasurer and a Director of Alachua. He owns 45% of the company stock (Alachua Remand Exhibit 14). Mr. Forsman will devote such time to the operation of the station as is necessary to fulfill his responsibilities as stockholder, corporate officer and member of the Board of Directors. He is not proposed to be integrated into the day-to-day operations of the proposed station (Alachua Remand Exhibits 15 and 17).

80. Mr. Robert L. Ballantine is Vice-President and a 10% stockholder of Alachua (Alachua Remand Exhibit 14). If the Alachua application is granted, he will terminate his present employment at Radio Station WDVR, Philadelphia and accept employment as the full-time resident General Manager of the proposed station. He wil be fully integrated into the station's operation. He intends to devote at least 50 hours per week to the station's operation, a little more than eight hours a day, six days per week. As Vice-President, a

[13] *Memorandum Opinion and Order*, 71 FCC 2d at 1229, Fn. 12: "In light of the remand and because the Section 307(b) issue may not be dispositive, the Presiding Judge should also make findings and conclusions on the contingent comparative issue."

Director and a 10% shareholder, he will devote such additional amounts of time as are necessary to carry out the duties and responsibilities inherent in these capacities (Alachua Remand Exhibit 8).

81. Mrs. Dianne L. Forrester is Secretary-Treasurer and a Director of Country (Country Remand Exhibit 3). Mrs. Forrester is proposed to work full-time at the proposed station as Office Manager.

82. Mr. Baxter Forrester is Vice-President and a Director of Country. He owns 50.1% of the company stock (Country Remand Exhibit 3). He is not proposed to be integrated into the daily operations of the proposed station.

83. Mr. Ray Forrester is President and a Director of Country. He owns 49.9% of the company stock (Country Remand Exhibit 3). If the Country application is granted, he will work full-time as General Manager of the proposed station. He will be fully integrated into the station's operation. He will be responsible for day-to-day programming decisions and will be in charge of all other aspects of station operations (Country Remand Exhibit 4).

Local Residence

84. Mr. Forsman resides at Route 1, Keystone Heights, Florida (Alachua Remand Exhibit 15). Mr. Kinsey resides at Smith Road, East Haddam, Connecticut (Alachua Remand Exhibit 9). Mr. Ballantine presently resides in King of Prussia, Pennsylvania. If the Alachua application is granted, he will move to Alachua (Alachua Remand Exhibits 8 and 17).

85. Mr. Baxter Forrester has lived in High Springs, Florida since 1941 (Country Remand Exhibit 1). Mr. Ray Forrester and Mrs. Dianne Forrester are both life-time residents of High Springs, Florida (Country Remand Exhibits 2 and 4).

Civic Participation

86. Mr. Forsman has been active in civic organizations in Gainesville, Florida. His activities include: member of the Board of Directors of the Gainesville Downtown Redevelopment Advisory Board and the Chamber of Commerce and appointment to the Eight Judicial Nominating Commission (Alachua Remand Exhibit 15).

87. Mr. Ballantine's civic participation activities include the following: 1975 - at Radio Station WGGG - helped arrange and promote the "WGGG and Palm Bowling Lanes Annual Charity Bowl" which helped raise money for the Gainesville United Way; 1976 - arranged public service broadcast time on WGGG for and was the announcer of the Kidney Foundation Charity event sponsored by a Gainesville civic organization and contributed time to write promotional literature and arrange public service air time on local radio stations for several non-profit clubs and charitable organizations in Gainesville (Alachua Remand Exhibit 9).

88. Mr. Ray Forrester has participated in various civic activities in High Springs, Florida, including: 1977–1978 - Vice-President and member, Elementary School PTA; 1976–1978 - Secretary-Treasurer of Volunteer Fire Department - member since 1964; 1976–1978 - Director of Chamber of Commerce and member and Sunday School Teacher at Church of Christ (Country Remand Exhibit 4).

89. Mr. Baxter Forrester has participated in various civic activities in High Springs, Florida, including: member of Board and President of the Chamber of Commerce (Country Remand Exhibit 1).

90. Mrs. Dianne Forester's High Springs civic activities include: membership in the elementary school PTA and Sunday School teacher at the Church of Christ (Country Remand Exhibit 2).

Broadcast Experience

91. Mr. Ballantine began employment as Sales Account Executive with Radio Station WGGG, Gainesville in 1973. He was subsequently promoted to the positions of local and general Sales Manager. In 1977 he became Sales Account Executive at Radio Station WDVR, Philadelphia, where he is presently employed (Alachua Remand Exhibit 8).

92. Mr. Ray Forrester received a Bachelor of Science degree in Broadcasting from the University of Florida in 1975. His studies included writing and reporting daily TV news shows for WUFT-TV and weekly reporting for WRUF-AM or FM. He also served as a paid student announcer on WRUF-FM (Country Remand Exhibit 4).

Past Broadcast Record

93. None of the principals of either applicant have or have ever had any other broadcast ownership interests (Alachua Remand Exhibit 18; Country Remand Exhibits 1, 2 and 4).

94. Mr. Ballantine, 10% stockholder of Alachua, was Sales Account Executive and local and general Sales Manager at Radio Station WGGG, Gainesville from 1973 to 1977. Since 1977, he has been and continues to be employed as Sales Account Executive at Radio Station WDVR, Philadelphia (Alachua Remand Exhibit 8).

95. Mr. Ray Forrester, 49.9% stockholder of Country, served as a paid student announcer at Radio Station WRUF-FM while he attended the University of Florida (Country Remand Exhibit 4).

Special Facilities

96. Alachua proposes to employ an emergency power generator if its application is granted. The generator will be installed at the transmitter site and will have sufficient power to assure operation of the station transmitter and accessory studio equipment during periods of normal power failure (Alachua Remand Exhibit 16).

Comparative Coverage

97. In its Initial Decision, Judge Dennison made findings regarding the comparative coverage of the applicants' proposals. See *ID* at 27. Only to the extent that the 307(b) issue was not dispositive of this case is comparative coverage relevant to the contingent comparative issue. The 307(b) issue would have been dispositive under Judge Dennison's Initial Decision had Alachua not been absolutely disqualified under the 1.65 misrepresentation issue. Therefore, the comparative coverage findings will not be treated in the conclusion of the contingent comparative issue reached herein.

Conclusions

1. In remanding this proceeding for further evidentiary examination under Issue 1,[14] the Board sought facts which would shed light on the personal involvement, knowledge and responsibility of Forsman for failure of GSMH and Young American to remit funds to the federal government (Remand Order at para. 5). In addition, questions were raised as to whether Forsman intentionally misled the Commission with respect to his lack of knowledge about GSMH's tax problems (Memorandum Opinion and Order, FCC 80M-503, released March 25, 1980).

2. The Board also requested that findings and conclusions be made on the contingent comparative issue (Footnote 12, Designation Order) and that the Section 307(b) issue be re-examined in the light of a grant of a construction permit to Station WIYD-FM in Palatka, Florida (Paragraphs 10–12, Remand Order). As indicated *supra*, the construction permit for the Palatka Station WIYD-FM has been deleted and the record made at the first hearing is therefore accurate and complete on this issue and the findings and conclusions as stated in the first Initial Decision will not be further considered herein.

Issues 1 and 2 - Withholding and FICA Taxes

3. It is undisputed that payments to the IRS to remit funds withheld from employee wages for FICA and income tax purposes were not made in a timely fashion on behalf of both Young American and GSMH which resulted in tax liens being placed against both operations. Forsman is the 90 to 100% owner of Young American and 33% owner and Director, Vice-President and Director of GSMH. Forsman is also the Secretary-Treasurer, Director and 45% owner of Alachua.

4. It is apparent from the record that neither Young American

[14] Issue 2, as added by the Presiding Judge, does no more than clarify Issue 1 to reflect that the concerns expressed by the Review Board deal with both the wages withheld for FICA (Social Security) and income tax purposes.

nor GSMH started out with any intention to avoid payments to the IRS. However, all witnesses[15] who testified, agreed these companies were eventually overcome by severe and serious cash flow problems. As a direct result of the cash flow problems, payments to the IRS to remit the withheld funds were not made in a timely manner by both Young American and GSMH. The critical issue here is to what extent can the failure to remit the taxes be chargeable to Forsman. There is a direct conflict of testimony as to Forsman's contemporaneous knowledge of the tax problems. It is concluded that deliberate decisions were made at both Young American and GSMH to allow the IRS payments to slide in favor of door-opener-type payments and that Forsman had contemporaneous knowledge of the tax problem.

5. Forsman acquired knowledge of a failure by Young American to pay its withholding and FICA taxes in the first half of 1977. But Forsman denies all responsibility or either the responsibility of participation in the non-timely payment of the taxes. The conclusion with respect to Forsman's knowledge of Young American's non-timely payment of taxes turns on the credibility of Forsman versus that of Childs. Childs testified that during the first quarter of 1977, because of cash flow problems, priorities were established as to the payment of the Young American creditors. The highest priority was assigned to those bills which had to be paid to keep the business operating. Childs testified that he and Forsman discussed these matters and that he (Childs) informed Forsman that Young American did not have sufficient funds with which to pay its obligation to IRS. Forsman denied having any conversation with Childs concerning priority of payment to creditors and he (Forsman) denied that Childs brought to his attention the fact that Young American did not have sufficient funds with which to pay the IRS. Alachua urges that Forsman is the more truthful witness while Country and the Bureau conclude Childs' testimony is the more credible. Alachua points to the conflict in testimony between Childs and Dr. Forsman (Forsman's father) as to who explained the duties of the job to Childs during his first week on the job. Dr. Forsman states he did the explaining while Childs states it was Forsman. The Presiding Judge observed both Dr. Forsman and Childs as witnesses and finds that Dr. Forsman's version of the initial training of Childs is correct. However, this does not serve as a basis to reject all of Childs' testimony. Childs was a bookkeeper and his functions were essentially ministerial. He had no ownership interest in the business and was paid a salary. It is not reasonable to believe, as Forsman urges, that an individual in this position would take it upon himself to make a decision not to pay the IRS. Childs' version of the events is supported by common sense, logic and everyday experience. Further, the record contains the testimony of two other bookkeepers, Riley and O'Byrne,

[15] O'Byrne, Riley, Childs, Dr. Forsman and Bryant.

whose testimony closely parallels that of Childs as to the circumstances leading to the non-timely payment of taxes and Forsman's knowledge thereof. Neither Childs nor Riley have any interest in the outcome of this proceeding and no motive was shown in the record to testify falsely.[16] Accordingly, it is concluded that the testimony of Childs and Riley is the more credible. See *Prattville Broadcasting Co.*, 5 FCC 2d 601 (Rev. Bd. 1966).

6. Likewise, it is concluded that Forsman's contemporaneous knowledge of a failure by GSMH to remit federal withholding and FICA taxes to the government has been established. Not only did Forsman have such knowledge, but other members of the GSMH Board both participated in and were ultimately responsible for the untimely payment of taxes. The testimony of O'Byrne is accepted that he was instructed by the Board, including Forsman, to pay the so-called "door closers" and the Board again, including Forsman, did nothing to assure that the taxes were being paid. Moreover, Mr. Bryant testified and independently established that taxes were mentioned at the Board meetings, that IRS obligations were not the subject of specific focus and that the Board knew that at times, there were insufficient funds to pay even the "door closers" and O'Byrne was expected to "juggle things" as best he could. Thus, even if the testimony of O'Byrne is discounted, there exists substantial other evidence to demonstrate that Forsman did have contemporaneous knowledge of the tax problems and for the additional reasons that the testimony of Forsman was rejected with respect to Young American, it is also rejected with respect to GSMH. Forsman's repeated explanations of lack of knowledge and the belief that someone else would attend to the matter are simply not acceptable when compared to the testimony of three bookkeepers during this time period (O'Byrne, Childs and Riley). All agree on a pattern of conduct, i.e., there were severe cash flow problems and list of payables would be reviewed and payment made only as required to keep the doors open.[17]

7. It is concluded that Issues 1 and 2 must be resolved adverse to Alachua. Forsman is found to have knowledge of, participated in and was responsible for the failure of Young American and GSMH to remit to the government wages withheld for federal withholding and FICA taxes. The issues (1 and 2) can be considered both on a comparative or basic qualification basis.

8. This Commission, like the IRS, must depend upon the

[16] Alachua suggests that Childs may have believed that Forsman viewed Childs as being personally responsible for the various IRS problems and thus Childs gave false testimony to avoid such blame and liability. This is rejected. The record contains nothing to support such a belief.

[17] O'Byrne's credibility has been attacked throughout this proceeding. First, it took an Order of the United States District Court in Florida to obtain his testimony and a grant of immunity was also provided. Also see footnote 9 *supra*.

voluntary and timely compliance with the Communications Act, and the Rules and policies, applicable to its licensees. Alachua, whose 45% owner is Forsman, seeks to become such a licensee and it has been found and concluded that Forsman must assume a direct responsibility for both the failure to file the necessary tax forms on a timely basis and a failure to remit to the government the money due. To further complicate the matter, the money due in this case represented for the most part funds withheld from employees' wages which Forsman's corporation in effect held in trust for the government to be turned into the government on a voluntary basis on specified dates. Even though Forsman did eventually pay these taxes plus penalties, it was not voluntary and the IRS and the Commission simply cannot function if it requires repeated enforcement proceedings to obtain required information. Accordingly, the Commission does look to the track record of its prospective licensees and licensees with other government agencies as an indication of its possible response to this Commission's reporting requirements. See *Report of Violations by Applicants of Laws of the United States*, 42 FCC 2d 399.

9. This *Report* does not adopt a blanket policy of disqualifying any applicant found to have violated a federal law. Rather, certain criteria should be applied such as was the action wilful or inadvertent, whether the violation was isolated or part of a pattern and the age of the violation. The Forsman conduct is found to be wilful, part of a pattern and recent enough in point of time to conclude that this Commission can expect little more of Forsman and Alachua than was experienced by the IRS. Accordingly, it is concluded that Issues 1 and 2 do go to the basic qualifications of Alachua and Alachua is found on this record under Issues 1 and 2 not to possess the required basic qualifications.

Issue 3

10. The purpose of Issue 3 is to determine whether Mr. Forsman made misrepresentations to the Commission in connection with sworn statements relating to his involvement with and knowledge of the failure of GSMH and Young American to timely remit funds to the federal government. It has been concluded under Issues 1 and 2 that Forsman did have contemporaneous knowledge that timely payments of withholding and FICA taxes were not being made to the IRS. It is further concluded that Forsman did misrepresent to this Commission the time period within which he first became aware of a failure to pay these taxes. Such misrepresentations were made in Forsman's prior testimony in this proceeding, in an opposition to a petition to enlarge issues, in responses to interrogatories submitted to Alachua by both the Bureau and Country and the proceedings on

remand. Such misrepresentations were not insignificant. For example, Judge Dennison refused to enlarge the issues[18] in the prior proceeding based in large part on Forsman's testimony in the prior proceeding and the response to the petition to enlarge issues that he (Forsman) had no responsibility, knowledge or fault for the tax problems. Further, when he found out about the tax matters, according to Forsman, the problem was resolved by firing the manager - O'Byrne. This was not an accurate picture of what actually transpired based on the remand record. It would serve no purpose now to speculate what Judge Dennison or the Review Board may have done had Forsman stated the actual facts. It is concluded that Issue 3 is resolved adverse to Alachua and this conclusion, standing alone, would be a basis to disqualify Alachua. The inaccuracies were either deliberate and intentionally deceptive or such statements made by Forsman to the Commission were made with such wanton, gross and callous disregard for the truth as to reflect the equivalent of an affirmative and deliberate intent. See *Big Valley Cablevision, Inc.*, 75 FCC 2d 702, 714 (1980); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978) and *Leflore Broadcasting Co.* v *FCC.*, 636 F 2d at 462.

Contingent Comparative Issue

11. The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), sets forth two primary objectives which the comparative process should attain. The first is the "best practicable service to the public", and the second is "a maximum diffusion of control of the media of mass communications." The Presiding Judge will consider the applicants' proposals under the standard comparative issue in light of these objectives, the guidance established in the *Policy Statement* and interpretive Commission decisions.

Maximum Diffusion of Control of the Media of Mass Communications

12. Diversification is a factor of primary significance since it constitutes a primary objective in the comparative process. *Policy Statement* at 394. None of the principals of either applicant have or ever had any ownership interest in any broadcast station or other media of mass communications. Accordingly, neither applicant will be awarded a preference for exhibiting a greater degree of diversification.

Best Practicable Service to the Public

13. The policy objective of providing the best practicable service

[18] Country's December 19, 1978 Petition to Enlarge Issues.

to the public takes into account several factors. These are awarded preferences according to both their quantitative and qualitative significance and merit.

Integration of Ownership and Management

14. Full-time participation in station operations by owners is of substantial importance. To the extent that participation by *owners* is less than full-time, the credit awarded drops sharply and no credit is given for proposed participation amounting to less than substantial time on a daily basis. *Policy Statement* at 395. The quantitative test for grants of varying measures of preference, therefore, looks to whether applicant owners are proposed to participate on a full-time, or at least substantial-time, basis at the station. Only those individuals with an ownership interest are considered in evaluating the applicant's integration proposal. *Triple C Broadcasting*, 16 FCC 2d 357, 363, 15 RR 2d 515 (Rev. Bd. 1969).

15. The quality of an integration proposal is enhanced by, and decisional significance is attributed to full-time integration of owners in management level positions exercising policy functions. Of first importance is the general manager's position. *Policy Statement* at 395; *East St. Louis Broadcasting Co.*, 29 FCC 2d 170, 172, 21 RR 2d 992 (1971), citing *Grand Broadcasting Co.*, 36 FCC 2d 925, 930 (1964).

16. Each applicant in this proceeding proposes to integrate one stockholder in the daily operation of its proposed station. Country proposes that Mr. Ray Forrester, a 49.9% stockholder, will work as full-time General Manager at the station. Alachua proposes to integrate Mr. Ballantine, a 10% stockholder, as its full-time General Manager. In *East St. Louis*, *supra*, at 173-174, the Commission concluded that a 30% differential in full-time integration gives the applicant with the greater ownership percentage a moderate preference. Accordingly, the 39.9% disparity in favor of Country merits a moderate preference for that applicant.

Local Residence, Civic Participation and Previous Broadcast Experience

17. The qualitative value of integration is also increased if participating owners have other attributes, including local residence, civic participation and previous experience. *Policy Statement* at 396. Therefore, the final comparative preference awarded to Country and Alachua may be adjusted to the extent that Mr. Ray Forrester or Mr. Ballantine possess and exhibit any measurable degree of these factors.

18. Previous broadcast experience (including activities which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance) is deemed of minor significance. But it may be examined qualitatively upon an offer of proof of particularly poor or good previous accomplishments.

On the other hand, where an owner proposes full-time participation, residence in the principal community to be served is of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future residence is accorded less weight than several years of present residence. Past participation in local civic affairs, as well as any other local activities indicating a knowledge of and interest in the community are considered as a part of a participating owner's local residence.

19. Mr. Ballantine presently resides in King of Prussia, Pennsylvania, where he has been employed as a Sales Account Executive at Radio Station WDVR, Philadelphia since 1977. If the Alachua application is granted, he plans to move to that community. Upon graduation from the University of Florida, Mr. Ballantine began employment at Radio Station WGGG, Gainesville as a Sales Account Executive. He was subsequently promoted to the positions of local and general Sales Manager. While employed at WGGG, he participated in several fund-raising and public service activities for local charitable organizations and national organizations that have Gainesville chapters.

20. Mr. Ray Forrester is a life-time resident of High Springs, where he has been active in numerous civic affairs and organizations. While an undergraduate at the University of Florida, he studied broadcasting and was a paid student announcer at WRUF-FM.

21. The moderate preference already accorded Country for integration of ownership and management is moderately enhanced by the qualitative attributes of Mr. Forrester's life-time residence in High Springs and the extent of his participation in local civic activities. Mr. Ballantine's intention to reside in Alachua if the application is granted deserves slight credit. There is no evidence that his accomplishments in the broadcasting field are meritorious.

Past Broadcast Record

22. Past broadcast record includes past ownership interests and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance in the comparative process if the past record exceeds the bounds of average performance.

23. None of the principals of either applicant have or have ever had any other broadcast ownership interests. Mr. Ballantine, 10% stockholder of Alachua, significantly participated at Radio Station WGGG, Gainesville as a Sales Account Executive and local and general Sales Manager. Furthermore, he is presently employed at Radio Station WDVR, Philadelphia as a Sales Account Executive. However, there is no evidence that his past broadcast record exceeds average performance levels. Therefore, neither applicant deserves a preference.

Special Facilities

24. In 1966, the Commission issued an *Addendum to Policy Statement*, 2 FCC 2d 667, 6 RR 2d 861, adding the acquisition and proposed use of auxiliary power equipment as a factor of decisional significance in comparative AM and FM broadcast proceedings. No absolute value was designated to be awarded proposals for emergency power. In *Seaborn Rudolph Hubbard*, 22 FCC 2d 30, 39, 18 RR 2d 625 (I.D. 1969), a slight preference was granted for an applicant's proposal to install emergency power facilities.

25. The provision of special facilities deserves a slight preference regardless of any showing of a history of power outages in the community to be served. The Commission's *Addendum* recites that auxiliary equipment was added as a comparative criterium in light of the northeast power failure experience, which demonstrated that the availability of emergency facilities was essential to providing radio service to the public during power failure emergencies. The frequency of power failures in individual communities was not balanced with the value to be accorded proposals for special facilities. The policy is to weigh this factor in light of the Commission's two primary comparative process objectives.

26. Alachua proposes to install and employ at its transmitter site an emergency power generator with sufficient power to assure station operations during periods of normal power failure. Accordingly, Alachua deserves a slight preference for these special facilities.

Conclusions on the Contingent Comparative Issue

27. The quantitative merit of Alachua's proposal to integrate a 10% owner as a full-time General Manager is slightly enhanced by qualitative credit for future residency and the minor significance accorded previous broadcast experience. On the other hand, the value of Country's basic quantitative proposal to integrate an owner as a full-time General Manager is substantially heightened by the qualitative factors of life-time residency, civic participation and a 39.9% differential in the ownership interests of Mr. Forrester and Mr. Ballantine in their respective companies. Thus, combining the respective quantitative and qualitative attributes of the Country and Alachua integration proposals, County is awarded a substantial preference.

28. In conclusion, because neither applicant deserves a preference for diversification or past broadcast record, and because Alachua deserves a slight preference for its special facilities and because Country is awarded a substantial preference for integration of ownership and management, the Country application is awarded a moderate preference for assuring the best practicable service to the public.

Ultimate Conclusions

The 307(b) Issue

29. If this proceeding were decided solely on Section 307(b) grounds, Alachua would prevail based upon the facts and conclusions of Judge Dennison. No new facts have been shown which would warrant any revision of Judge Dennison's prior conclusion.

Issues 1, 2 and 3

30. These issues are considered as a group since all involve Forsman's activities with respect to tax matters. It is concluded that either on the basis of the facts as found on Issues 1 and 2[19] or Issue 3 would each be a grounds to disqualify Alachua. Accordingly, it is not possible to reach a conclusion on Section 307(b) considerations as Alachua is found to be disqualified.

The Contingent Comparative Issue

31. It has been concluded that because Alachua deserves a slight preference for its special facilities and because Country is awarded a substantial preference for integration of ownership and management, the Country application is found to be preferred on the basis of a moderate preference for assuring the best practicable service to the public.

32. Accordingly, IT IS FOUND that the findings and conclusions on Issues 1, 2 and 3 dictate that the application of Alachua be denied and that of Country granted.

33. So unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Country (File No. BPH-9937) IS GRANTED and the application of Alachua (File No. BPH-10269) IS DENIED.[20]

FEDERAL COMMUNICATIONS COMMISSION
BYRON E. HARRISON *Administrative Law Judge*

[19] Issues 1 and 2 are actually one issue other than to make clear that both withholding and FICA taxes are involved.

[20] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Candor, See also Character or Misrepresentation
Character Qualifications, Effect of Misrepresentation
Character Qualifications, Lack of Candor
Misrepresentation, Situations Defining

Commission modified Review Board Decision. Findings or misrepresentation or lack of candor, while analogous to violations of 18 U.S.C. Sec. 1001, do not depend on technical violation of statute having occurred. Both misrepresentation and lack of candor involve deceptive intent. Applicant's misstatements here *de minimis*, warranting only slight demerit overcome by overall comparative advantage.
-Fox River B/cing, Inc.
BC Docket No. 80–310

FCC 83–49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FOX RIVER BROADCASTING, INC. De Pere, Wisconsin	BC Docket No. 80–310 File No. BPH-780828AB
Jon A. Le Duc d/b/a AMERICAN COMMUNICTIONS COMPANY De Pere, Wisconsin	BC Docket No. 80–312 File No. BPH-780831AI
For Construction Permit for New FM Broadcast Station	

ORDER

(Adopted: January 27, 1983; Released: February 2, 1983)

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

1. The Commission has before it applications for review, filed March 3, 1982, by Fox River Broadcasting, Inc. (Fox) and the Broadcast Bureau, an erratum filed March 17, 1982, by the Bureau, and an opposition, filed March 18, 1982, by American Communica-

tions Company (American). Review is sought of a Decision by the Review Board[1] granting American's application for a new FM station in De Pere, Wisconsin and denying Fox's mutually exclusive application. The Board reversed an Initial Decision by Administrative Law Judge Walter C. Miller, which had disqualified American.[2]

2. Principally at issue here is whether American should or should not be disqualified or assessed a comparative demerit because its sole owner, Jon A. LeDuc, committed misrepresentations or lacked candor in his dealings before the Commission. The Board concluded that only a slight comparative demerit was warranted, whereas the Administrative Law Judge had concluded that American should be disqualified. The applicants for review also assert that American should be disqualified.

3. The alleged misrepresentations or lack of candor involve Le Duc's statements concerning the roles that two individuals—Janet Gollnick and Loretta David—would play at the proposed station.[3] Gollnick and David are significant because they participated in conducting American's ascertainment survey and because allegations were made that Gollnick and her husband would be undisclosed principals of American. Le Duc represented in a July 27, 1979 amendment to American's application, and subsequently, that Gollnick and David were prospective employees of American's proposed station for the purpose of conducting the ascertainment survey. However, in testimony at an October 1, 1980 deposition, Le Duc denied that Gollnick was a prospective employee. Questions have also been raised as to whether David was a prospective employee.

4. We are fully in accord with the Board's result in this case and with the Board's discussion of the specific facts. However, we find the Board's discussion of Le Duc's deposition testimony somewhat cursory. Le Duc's testimony goes beyond merely denying that Gollnick intended to be "involved" with the proposed station as stated by the Board.[4] A fair reading of Le Duc's testimony suggests that he failed to exercise due care in making his statements. On the other hand, the circumstances surrounding Le Duc's testimony tend to mitigate the adverse inferences that might otherwise be drawn. Le Duc appears to have been testifying under the pressure of cross examination intended to show that Gollnick and her husband were undisclosed principals of American.[5] At the time of Le Duc's

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[1] 88 FCC 2d 1132 (Rev. Bd. 1982).
[2] 88 FCC 2d 1145 (Admin. L.J. 1981).
[3] 88 FCC 2d at 1138–43, 1146–53, 1156–57.
[4] 88 FCC 2d at 1139, 1141 n. 20.
[5] Fox Exh. 8A, 8C.

testimony, all parties clearly understood that Gollnick had been proposed as a prospective employee[6] making it highly unlikely that Le Duc could have consciously intended a deception by stating at the deposition that Gollnick was not a prospective employee. The discrepency was not called to Le Duc's attention during the deposition session, and when it was in a subsequent pleading, Le Duc corrected himself.[7] These factors tend to indicate that Le Duc, under the pressure of cross examination, made a spontaneous misjudgment, which he later rectified.[8] Although Le Duc's attempts to explain this apparent misjudgment may have appeared to the ALJ as "glib" they do not establish any overt or intentional deception. In sum, we concur in the Board's imposition of a slight comparative demerit against American based on Le Duc's lack of care in making his statements, but we are convinced that the record does not support a finding of significant misconduct.

5. Although we agree with the Board's treatment of the specific facts of this case, we believe comment on a further aspect of the Board's Decision is also warranted. The Board prefaced its consideration of the facts of this case with a general discussion of misrepresentation and lack of candor with which we do not wholly agree.[9] This discussion does not affect the validity of the Board's disposition of this case, but we will modify it in order to avoid possible confusion in the consideration of similar matters in the future.

6. We believe the Board's discussion overstates the distinction between misrepresentation and lack of candor. Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form. We therefore disavow the Review Board's suggestion that lack of candor may involve failures to provide information in the absence of any deceptive intent.[10] We also disavow the suggestion that lack of candor is inherently less serious than misrepresentation. The seriousness of either offense depends on the facts and circumstances of the particular case.[11]

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[6] *See, e.g.*, Notice to Take Deposition Upon Oral Examination, filed August 11, 1980, by Fox.

[7] Fox Exh. 9A.

[8] *Cf. Janus Broadcasting Co.*, 78 FCC 2d 788 (1980); *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973).

[9] 88 FCC 2d at 1133–38.

[10] In particular we disagree with the Board's interpretation of *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974 (1974). Our reading of the court's opinion indicates that the court recognized the element of deception present there. *Compare* 88 FCC 2d 1135 n.4 with 670 F.2d at 230–31.

[11] *Compare RKO General, Inc.* v. *FCC*, *supra* note 10 (lack of candor results in denial) *with Janus Broadcasting Co.*, *supra* note 8 (misrepresentation results in short term renewal).

7. We also disavow the Review Board's reference to 18 U.S.C. § 1001[12] as a guideline for Commission proceedings involving misrepresentation and lack of candor. Our concern with misrepresentation and lack of candor stems from the necessity of relying on licensees' representations to the Commission.[13] The criminal statute clearly deals with misconduct analogous to misrepresentation and lack of candor and may form the basis for a specific issue, such as perjury. However, we reserve judgment as to the relevance, if any, of the specific requirements of the statute to findings of misrepresentation and lack of candor in general.

8. ACCORDINGLY, IT IS ORDERED, That the Applications for Review, filed March 3, 1982, by Fox River Broadcasting, Inc. and the Broadcast Bureau ARE DENIED; and that FCC 82R-3, released February 1, 1982, 88 FCC 2d 1132 IS MODIFIED as indicated above.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: Applications for Review in the DePere, Wisconsin, comparative FM radio proceeding (BC Docket Nos. 80–310 and 80–312)

I believe that we should overrule the Review Board and affirm the Administrative Law Judge's Initial Decision in favor of Fox River Broadcasting, Inc. for two reasons.

First, it seems to me that in finding that LeDuc's descriptions of Gollnick's and David's employment status did not "stretch" so far beyond "exaggeration", "puffing", or "mired memory" as to constitute misrepresentation (88 F.C.C. 2d 1143), the Review Board simply substituted its judgment on this question for that of the ALJ. However, it is clear from the ID that the ALJ based his finding that LeDuc had misrepresented the facts (i.e., lied) in part on his conclusion that LeDuc, when called on at the April 7, 1981, hearing session to reconcile his apparently inconsistent prior representations on the employment status of these two women, "displayed a chamelon-like (sic) glibness" and was "both unsuccessful and unconvincing." (88 F.C.C. 2d 1157). In deciding the always elusive question

[12] Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[13] *See Leflore Broadcasting Co., Inc.* v. *FCC*, 636 F.2d 454 (D.C. Cir. 1980), citing *inter alia FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

of truthfulness, the ALJ had the benefit both of the record of LeDuc's apparently inconsistent statements and his observation of LeDuc's demeanor while attempting to reconcile them. The Board, and in turn we, have only the lifeless record. In this situation, it seems to me that the ALJ's finding that LeDuc had lied should be affirmed unless it is clear from the record that it was wrong, and in my judgment that is not the case.

Second, it seems to me that even if the Commission affirms the Review Board's finding that LeDuc merely lacked candor, and that American was therefore not basically disqualified as a potential licensee, it should reverse the Board's decision on comparative grounds. To my mind, award of any preference for integration of a person found to have lacked candor in the very same proceeding is simply illogical. Logically, LeDuc's integration should count against American to at least some degree. At best, it should be ignored. And if LeDuc's integration is counted as a demerit, or even ignored, it seems clear that the ALJ was correct that Fox River should win this proceeding on comparative grounds. (88 F.C.C. 2d 1158.)

I therefore respectfully dissent.

Fairness Doctrine, Licensee Obligation
Personal Attack, Broadcaster Obligations Regarding

Application for review denied. If a complainant is aware of a licensee's willingness to afford an opportunity to present contrasting viewpoints and he conveys this awareness to the licensee, the licensee has satisfied its Fairness Doctrine obligation to provide a reasonable opportunity for the presentation of contrasting viewpoints.
–Henry W. Maier

FCC 83–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of

Honorable Henry W. Maier
Mayor of the City of Milwaukee

against

WTMJ, Inc.

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on September 1, 1982, by Henry W. Maier, Mayor of Milwaukee, Wisconsin, of the Broadcast (now Mass Media) Bureau's ruling of July 29, 1982. On September 15, 1982, WTMJ, Inc. licensee of stations WTMJ(AM), WKTI-FM and WTMJ-TV, Milwaukee, Wisconsin, filed an Opposition to the Application for Review.

The Complaint

2. The complaint was based upon 15 editorials broadcast on the licensee's three stations from March 2 through May 6, 1981, by Mr. Ed Hinshaw, the licensee's Manager of Public Affairs, and Mr. Michael McCormick, president of WTMJ, Inc. These editorials concerned the manner in which the City of Milwaukee managed its garbage collection system and dealt with its labor disputes involving fire, police and garbage collection employees. The contents of these broadcasts are set forth in the Bureau's ruling (attached as an Appendix to this ruling).

3. Mr. Maier, in his original complaint received June 5, 1981,

had claimed that in the editorials the licensee falsely stated and suppressed "basic facts"; that the language in the editorials constituted an attack upon his honesty, character, integrity and like personal qualities during the discussion of a controversial issue of public importance; and that the licensee did not meet its obligations under the personal attack rule (§ 73.1920(a) of the Commission's rules) to notify him within seven days, provide a tape or accurate summary of the broadcast, and present him with an opportunity to reply. Mr. Maier also alleged that the licensee violated the Fairness Doctrine by not presenting contrasting viewpoints on the controversial issues of public importance, which he defined as "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers."

4. Mr. Maier's initial complaint was denied by the Bureau in a letter dated August 18, 1981, because he failed to establish a *prima facie* Fairness Doctrine or personal attack complaint, and to furnish extrinsic evidence of deliberate news distortion.[1] In response to the Bureau's denial of Mr. Maier's original complaint, he submitted an amended version, received September 16, 1981.

5. Mr. Maier's amended complaint was premised upon the allegations and arguments raised in his original complaint. He also submitted voluminous documentation on the controversiality and public importance of the subject issues. The Bureau then requested the licensee to submit its comments on the complaint.

6. On December 16, 1981, the licensee filed a response to the Bureau's letter of inquiry. The licensee agreed with the complainant that the issues were controversial and of public importance at the times of the broadcasts. It maintained that it "has utilized a variety of methods to encourage debate and to present both sides of the issues being discussed in compliance with the Commission's Fairness Doctrine." These methods include:

(a) closing each editorial with the following statement:
This comment is a statement of opinion on the part of the management of Channel 4 WTMJ Radio and WKTI for the purpose of stimulating thought and consideration of matters which are of concern to the public. Any expression on your part will be welcome. Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201;

[1] The Bureau informed Mr. Maier that the Commission will act appropriately to protect the public interest against the rigging or slanting of the news where we have received extrinsic evidence of such actions. *Hunger in America*, 20 FCC 2d 143 (1969). By "extrinsic evidence" we generally mean evidence outside the content of the program. Mr. Maier has not submitted nor purported to submit such evidence.

(b) maintaining an extensive mailing list of people who are interested in a particular issue, to whom both a copy of and an invitation to respond to the editorial are sent;
(c) maintaining a permanent mailing list of people to whom a copy of and an invitation to respond to *all* the editorials are sent.

In this context, the licensee asserted that Mr. Maier received not one but at least two copies of the editorials with corresponding invitations to respond, because he was on two lists, one to receive copies of all editorials and one to receive copies of every editorial dealing with city matters. Furthermore, the licensee maintained that Mr. Maier made special requests for immediate copies of the subject editorials, which were promptly accommodated. The licensee also stated that it made a direct on-the-air invitation to Mr. Maier to respond, in addition to a written invitation to him to debate the Governor on the impact of the new state budget, which Mr. Maier, himself, asserted would have an important effect on city services such as those at issue here.

7. The licensee also denied that it failed to meet its Fairness Doctrine obligation to present contrasting viewpoints on the subject controversial issues of public importance. It argued that although it was unsuccessful in getting Mr. Maier to respond, contrasting viewpoints were presented on the stations by others who did accept its invitations to respond. Additionally, the licensee maintained that its news coverage of the two subject issues, including news interviews with Mr. Maier and other city officials and two of Mr. Maier's press conferences that dealt specifically with the subject editorials, produced a balanced presentation.

8. With respect to the personal attack segment of Mr. Maier's complaint, the licensee argued that none of the statements in the subject editorials attacked the "honesty, integrity or like personal qualities of an identified person or group," and therefore did not constitute a personal attack under Section 73.1920(a) of the Commission's rules. Although the licensee acknowledged that the subject editorials may have voiced a strong disagreement with the manner in which Mr. Maier handled the aforementioned situations, it argued that the editorials did not contain any attacks upon Mr. Maier's character or integrity. Furthermore, even though the licensee denied that the personal attack rule was applicable, it stated that as a matter of routine station policy it nevertheless satisfied the requirements of the rule to notify the person attacked within seven days, provide a tape or accurate summary of the broadcast, and offer a reasonable opportunity to reply over its facilities.

9. On February 1, 1982, Maier filed a reply to the licensee's response. Mr. Maier contended that under the Fairness Doctrine a licensee must assure that in its overall programming it has not left the public uninformed as to the other viewpoints on a controversial

issue of public importance. Within this framework, he argued that the licensee could not have met its Fairness Doctrine obligation by merely adopting a general policy of broadcasting opposing views. Furthermore, Mr. Maier denied ever receiving a specific invitation to reply from the licensee and questioned both the licensee's allegation of having provided a balanced news coverage of the subject issues and the validity of the licensee's news log.

10. In the personal attack segment of Mr. Maier's reply he argued that "accusations of illegal conduct which imply improper or corrupt motives on the part of the attacked party" were made in the subject editorials. He also argued that the licensee must substantiate its claim that it mailed transcripts of the editorials to him within seven days of each broadcast.

Bureau Ruling

11. The Bureau denied Mr. Maier's complaint on several grounds. Although both parties acknowledged the controversiality and public importance of the issues, based on the record the Bureau could not find that the licensee had violated the Fairness Doctrine. According to the Bureau, the facts indicated that Mr. Maier was aware of the licensee's willingness to afford him on opportunity to reply to the editorials, and Mr. Maier conveyed this awareness to the licensee. The Bureau noted that, according to the licensee, Mr. Maier told a WTMJ reporter that he was not interested in availing himself of the normal reply opportunity. In this context, the Bureau cited *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 59 FCC 2d 1317 (B/c Bur. 1976), where it stated "the network is not required to make extraordinary efforts to present opposing points of view, only those which are reasonable under the circumstances." *Id.* at 1319. Therefore, the Bureau concluded, "in the circumstances here we believe that the efforts the licensee made to procure contrasting views were reasonable."

12. In addressing the personal attack aspect of Mr. Maier's complaint the Bureau relied on *L. E. White, Jr.*, 11 FCC 2d 687 (1968). There, the Commission ruled that its action is not warranted on a personal attack complaint if an offer of time to the complainant is still outstanding.

Application for Review

13. Mr. Maier reiterates his complaint. He alleges that the licensee did not satisfy its Fairness Doctrine obligation "to encourage and implement the broadcast of all sides of the controversial issues." Moreover he maintains that he was never specifically offered an opportunity to respond to any of the 15 editorials. With respect to the licensee's announcement at the end of each editorial, which states, "any expression on your part will be welcome, Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201," Mr. Maier

contends that this is not an invitation to present contrasting viewpoints on the licensee's facilities. Mr. Maier questions the Bureau's characterization of "the unspecified mailing" as containing an invitation. He maintains that the Bureau was wrong in concluding that on at least three different occasions, there was direct communication between the licensee and Mr. Maier's office offering him an opportunity of respond to the editorials.

14. With respect to the personal attack aspect of Mr. Maier's complaint, he argues that the personal attack rule has specific requirements with which there must be strict compliance. Finally, Mr. Maier reasserts his objections to the "claimed use of a mailing list for [licensee's] editorial announcements."

15. The licensee filed an Opposition to Application for Review on September 15, 1982. In its reply the licensee maintains that Mr. Maier failed to establish that the conclusions drawn by the Bureau were inaccurate. Furthermore, the licensee asserts that Mr. Maier had the burden of establishing that its offers of reply time either were not broadcast or mailed to him personally. The licensee also argues that the precedents in cases such as *Mid-Florida Television Corporation*, *CBS*, and *L.E. White, Jr.*, cited above, "all support the Bureau's conclusion that the methods employed by WTMJ to solicit opposing viewpoints satisfied its obligations under the Fairness Doctrine and Personal Attack Rules." (Footnote omitted.) In conclusion, the licensee maintains "Maier's Application for Review satisfies none of the requirements of Section 1.115 of the Commission's Rules."

Discussion

16. Having carefully examined the pleadings before us, we cannot conclude that Mr. Maier has presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that, in the context of this case, the licensee "diligently sought to present contrasting views." The Bureau notes that according to the license there was *"direct communication"* between the station and Mr. Maier's office. As an example of these direct communications, the licensee referred to its conversation with Art Strickland of Mr. Maier's staff during which he indicated that Mr. Maier's office was aware of Mr. Maier's opportunity to reply. Another example involved a station news reporter and Mr. Maier. The record indicates that upon being asked if he intended to reply, Mr. Maier responded, "When I respond, it will be on my own terms." Mr. Maier provides no evidence to refute this information. Therefore, we agree with the Bureau that Mr. Maier was in fact aware of the licensee's willingness to afford him an opportunity to reply to the editorials and that Mr. Maier conveyed this awareness to the licensee. The announcement at the end of the editorials, "Any expression on your part will be welcome," and the

various offers of reply time clearly are acceptable ways of encouraging the broadcast of differing viewpoints on controversial issues of public importance. The burden is on a complainant to show that in its handling of a controversial issue of public importance a licensee has acted unreasonably.[2] In this case, Mr. Maier has furnished no persuasive evidence to refute the licensee's claim that its offers of reply time were broadcast and that copies of the editorials were mailed to him personally.

17. With respect to the personal attack aspect of the complaint, we agree with the Bureau, that *L.E. White Jr.*, cited above, governs. There we stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time . . . to respond to the broadcast in question." Therefore, the Bureau correctly held that, based on the record, Mr. Maier was clearly aware of his opportunity to respond, and that he rejected all the offers made to him, claiming that he would respond only "on [his] own terms." Under these circumstances the licensee could not be found to be unreasonable.

Conclusion

18. Mr. Maier states that the Fairness Doctrine imposes an affirmative duty on licensees to encourage and implement the broadcast of contrasting viewpoints of controversial issues of public importance. Although this is correct, broad discretion is afforded licensees in program selection and presentation, including the spokesperson and the content and duration of the broadcast. The Commission reviews a broadcaster's decision to determine whether it has acted reasonably and in good faith, and we will not substitute our judgment for that of the broadcaster. In this instance, whether or not the Fairness Doctrine and personal attack rule were applicable to the editorials, the licensee provided numerous opportunities for Mr. Maier to respond to the editorials, every one of which he rejected. The Fairness Doctrine and personal attack rule require nothing more from broadcast licensees. We agree with the Bureau that we cannot find the licensee acted unreasonably in this matter.

19. Accordingly, in view of the above considerations, the Application for Review filed by Henry W. Maier IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[2] *Fairness Doctrine and Public Interest Standards ("Fairness Report")*, 48 FCC 2d 1, 17 (1974).

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL 29 1982

IN REPLY REFER TO:
8330-L
C1-621

Honorable Henry W. Maier
Mayor of Milwaukee
Room 201 City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

Dear Mr. Maier:

This is in further reference to your Fairness Doctrine complaint against WTMJ, Inc., licensee of stations WTMJ(AM), WKTI-FM and WTMJ-TV, Milwaukee, Wisconsin.[1]

Your complaint is based upon 15 editorials broadcast from March 2 through May 6, 1981, by Mr. Ed Hinshaw, the licensee's manager of Public Affairs, and Mr. Michael McCormick, president of WTMJ, Inc., on the licensee's three stations. You allege that these editorials falsely misstated and suppressed "basic facts." You also argue that the subject editorials contained information which attacked your honesty, character, integrity and like personal qualities during the discussion of a controversial issue of public importance. You define the controversial issues of public importance as "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers." Furthermore, you allege that the licensee has failed to meet its obligations under the Personal Attack Rule (§ 73.1920(a) of the Commission's rules) by failing to notify you within seven days, provide a tape or accurate summary of the broadcast and present you with an opportunity to reply. You also assert that the stations violated the Fairness Doctrine by devoting "approximately twenty-one minutes of air time to their editorial position without devoting any air time to opposing viewpoints."

On November 17, 1981, we informed the licensee of your complaint regarding the aforementioned editorials, and requested that it comment on its merits. However, we limited the inquiry to the Fairness Doctrine and personal attack aspects of your complaint, and did not request the licensee's comments on your factual suppression and misstatement allegations.[2]

---

[1] Your original complaint, received June 5, 1981, was denied by the Bureau in a letter dated August 18, 1981, because you failed to submit a *prima facie* Fairness Doctrine or personal attack complaint. In response to our denial of your original complaint you submitted an amended version, received September 16, 1981, which is the subject of this action. The licensee filed a response to a Commission inquiry on December 16, 1981; you filed a reply to that response on February 1, 1982.

[2] In our letter of August 18, 1981, we informed you that the Commission will act appropriately to protect the public interest against the rigging or slanting of the news where we have received extrinsic evidence of such actions. *Hunger in America*, 20 FCC 2d 143 (1969). By extrinsic evidence the Commission generally means evidence outside the content of the program. You have not submitted such evidence.

The licensee filed a response to our letter of inquiry on December 16, 1981. In its response the licensee acknowledges that the editorials referred to in your amended complaint presented views on controversial issues of public importance. Regarding the Fairness Doctrine aspect of your complaint, the licensee states that it "has utilized a variety of methods to encourage debate and to present both sides of the issues being discussed in compliance with the Commission's Fairness Doctrine."[3] In this context, the licensee asserts that you received a copy of and an invitation to respond to every editorial dealing with city matters. Further, the licensee maintains that you are on its permanent list to receive copies of *all* editorials and therefore were sent an additional copy of and invitation to respond to each editorial cited in your complaint. The licensee declares that your special requests for immediate copies of the subject editorials were promptly accommodated and your office indicated at that time it was aware of your opportunity to respond. Furthermore, the licensee states that it made both a direct on-the-air invitation to you to respond and a written invitation to you to debate the Governor on the impact of the new state budget, which you asserted would have an important effect on city services such as those at issue here.

The licensee argues that although all of its offers to you were fruitless, contrasting viewpoints were presented on the stations by others who did accept its invitation to respond. In addition, the licensee maintains that its news coverage of the two issues cited in your amended complaint, which included interviews with you and other city officials, produced a balanced presentation. Within this framework, the licensee states that in mid-March 1981, two of your press conferences, in which you specifically expressed your opinions about the subject editorials and about recent developments in the fire fighters' strike, were carried live by the licensee's television station (and excerpted by its radio stations).

With respect to your allegations that the licensee violated the Personal Attack Rule, it argues that none of the statements in the subject editorials constituted an attack upon the "honesty, integrity or like personal qualities of an identified person or group," and therefore cannot be considered a personal attack under Section 73.1920(a) of the Commission's rules. Although the licensee acknowledges that the subject editorials voiced a strong disagreement with your statements and actions regarding the aforementioned situations, it argues that the editorials did not contain any attacks upon your character or integrity. Even though the licensee believes that the Personal Attack Rule was not applicable, it states that it nevertheless satisfied the requirements of the rule to notify the person attacked within seven days, provide a tape or accurate summary of the broadcast and offer a reasonable opportunity to reply over its facilities as a matter of routine station policy.

On February 1, 1982, you filed a reply to the licensee's December 16, 1981 response to your complaint. You maintain that under the Fairness Doctrine a licensee must assure that in its overall programming it has not left the public uninformed as to the other viewpoints on a controversial issue of public importance. In this context, you argue that the licensee has not satisfied its Fairness Doctrine obligation. Your claim that "the adoption of a general policy to broadcast opposing views does not satisfy WTMJ's affirmative obligation to encourage the broadcast of contrasting views." You also assert that none of the licensee's stations issued a specific invitation to reply to the subject editorials. Further, you question both the licensee's allegation of having provided a *balanced* news coverage of the subject issues and the validity of the licensee's "news log," which you refer to as "someone's out-of-order summary of selected news items."

In the personal attack segment of your reply you state that the licensee in its editorials made allegations regarding the motives for your statements and actions towards the fire fighters' union and your complicity in illegal activities. Therefore,

[3] For further details see the *Discussion* portion of this letter, *infra*.

you conclude that these editorials constituted "accusations of illegal conduct which imply improper or corrupt motives on the part of the attacked party." You allege that the licensee has failed to meet its obligations under the Personal Attack Rule since no specific offers of time to reply were made to you. Furthermore, you maintain that the licensee has failed to substantiate its claim that it mailed a transcript of the editorials to you within seven days of each broadcast.

Discussion

As we advised you in our letter of August 18, 1981, the complainant has the burden of setting forth specific information necessary to establish a *prima facie* case of a violation. *Fairness Report*, 48 FCC 2d 1 (1974). Within this framework, you define the controversial issues of public importance as: "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers."

The licensee acknowledges that the subject issues are controversial and of public importance. However, it maintains that it has satisfied its Fairness Doctrine obligation to afford a reasonable opportunity for the presentation of contrasting viewpoints in a number of ways. The licensee lists three methods by which it solicits opposing viewpoints:

(1) by closing each editorial with the following statement:
This comment is a statement of opinion on the part of the management of Channel Four, WTMJ Radio and WKTI for the purpose of stimulating thought and consideration of matters which are of concern to the public. Any expression on your part will be welcome. Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201;

(2) by maintaining an extensive mailing list of people, who are interested in a particular issue, to whom both a copy of and an invitation to respond to the editorial are sent; and

(3) by maintaining a permanent mailing list of people to whom a copy of and an invitation to respond to *all* the editorials are sent.

As we previously informed you, a licensee's announcement at the beginning or end of a program that opportunity will be made available for the expression of contrasting views upon request is an acceptable way of encouraging the broadcast of differing viewpoints on a controversial issue of public importance. *Mid-Florida Television Corporation*, 40 FCC 620, 621 (1964). Moreover, a licensee's policies of mailing out copies of and invitations to respond to editorials have also been held by the Commission to be viable alternatives for fulfilling a licensee's obligations under the Fairness Doctrine. *Id.*; *CBS (KNX)*, 34 FCC 2d 773 (1972). The question here is whether, under the facts of this case, the language, "any expression on your part will be welcome," fulfills the licensee's affirmative obligation to provide a reasonable opportunity to reply. Also, the record here shows that in addition to the over-the-air announcements and the mailings, on at least three different occasions there was *direct communication* between the station and your office offering you an opportunity to respond to the editorials.

Notwithstanding your contention that the licensee's aforementioned invitations were insufficiently specific, it appears that you were in fact aware of the licensee's willingness to afford you an opportunity to reply to the editorials and that you

conveyed this awareness to the licensee. For example, the licensee states that you told a WTMJ reporter that you were not interested in availing yourself of the normal reply opportunity, saying, "When I respond, it will be on my own terms." Under these circumstances, and especially given your clear awareness that an opportunity to reply was available, we conclude that the licensee was not required to issue more specific invitations to you and, therefore, that it diligently sought to present contrasting views. *See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 59 FCC 2d 1317 (B/c Bur. 1976). There, the Bureau stated, "The network is not required to make extraordinary efforts to present opposing points of view, only those which are reasonable under the circumstances." *Id.* at 1319. As to responding on your own terms, please note that although the Commission is authorized to license broadcast stations and to regulate their operations in some respects, under our Constitution's First Amendment and the prohibition against censorship in the Communications Act, neither this nor any other governmental agency can direct broadcasters to present or not present specific material (except, of course for political candidates' rights). The licensee has wide discretion in determining the format and content of programs, including those which fulfill its fairness obligations. Thus, the licensee can place whatever restriction it wishes upon such programs, as long as the end result is a reasonable opportunity to respond. The Communications Act also states (in Section 3(h)) that the broadcaster is not a "common carrier"; this means that stations are not required to present all matter that is offered or recommended to them for broadcast.

Accordingly, in the circumstances here we believe that the efforts the licensee made to procure contrasting views were reasonable. We also note that you have neither responded to the licensee's invitations, nor have you specifically requested and been denied air time by the licensee. Had you, unlike the Teamsters, accepted offers made to you by the licensee and "thereafter complained that [you were] not afforded a reasonable opportunity to respond to the issues," we then could have considered your complaint in a different context. *Id.* However, in light of your refusal to accept the licensee's offers to respond to the editorials, you cannot persuasively claim that you were denied an opportunity to present your views for purposes of the Fairness Doctrine.[4]

In addressing the personal attack aspect of your complaint we believe the Commission's decision in *L.E. White, Jr.*, 11 FCC 2d 687 (1968), applies. There, the Commission stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time to Reverend Hargis to respond to the broadcasts in question." As we mentioned above, the record here shows that you did not accept the licensee's offers to respond to the editorials, claiming that you would respond only "on [your] own terms." However, the licensee has discretion in this area, and you have not shown how any offers it made to you were unreasonable.

In view of the foregoing, we do not believe that any further Commission action is warranted. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission's rule 1.4(b)(2)) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to

[4] We are not here saying that the use of the language "any expression, etc." at the end of the editorials would in all instances constitute a clear invitation to the public "to respond" to the editorials. However, in this case, we cannot find the licensee unreasonable in its conclusion that you were invited to respond to various programming.

the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

JEFFREY W. MALICKSON *Assistant Chief*
Complaints and Compliance Division
Broadcast Bureau

Comparative Hearing
FM Station, Authorization
Minority Ownership
Ownership and Management, Integration of
Review by Review Board

Review Board affirms Initial Decision, grants FM broadcast application proposing 100% full-time participation of ownership in management (plus slight qualitative enhancement for broadcast experience), and denies competing application proposing 45% full-time participation only (plus significant qualitative enhancement for 100% minority ownership).
-*HLD & M Communications*
BC Docket No. 81–429

FCC 83R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HLD & M COMMUNICATIONS Cape Charles, Virginia	BC Docket No. 81–429 File No. BPH-800508AA
RONALD SMITH Cape Charles, Virginia	BC Docket No. 81–430 File No. BPH-800827AI
For Construction Permit for a New FM Station	

APPEARANCES

Louis J. Ebert and *Robert B. McKenna* for HLD&M Communications; *Ray R. Paul* for Ronald Smith; and *Norman Goldstein* for Chief, Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: March 11, 1983; Released: March 17, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. A comparative hearing was held in this case because two applicants proposed to establish a new FM station in Cape Charles, Virginia and only one could be granted. See *Policy Statement on*

Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). In an Initial Decision, FCC 82D-64, released September 10, 1982, Administrative Law Judge Frysiak, after applying the Commission's *Policy Statement*, *supra*, and precedent, *WPIX, Inc.*, 68 FCC 2d 381, 409–12 (1978), found that Ronald Smith's application was superior and entitled to a grant. The losing applicant, HLD & M Communications, filed a brief and exceptions on October 12, 1982 but did not request oral argument. Additional pleadings were filed on October 12, November 5, 8, December 13 and 28, 1982; January 6 and 11, 1983. After reviewing the record in the light of the parties' contentions the Review Board will affirm the Initial Decision. We need not write at length because the ALJ's basic findings are largely undisputed, firmly supported by the record, and his conclusion accords with past and recent Commission precedent. See *WPIX, Inc.*, *supra*; *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982).

2. *Background*: The basic facts are accurately set out in the ALJ's findings, ID paras. 1 to 28. Prior to the hearing HLD & M Communications (Communications) was found financially qualified by the ALJ in a summary decision. ID para. 2. Based on the record and the findings of fact, ID paras. 3–7, Communications was awarded two slight demerits which were not considered decisional by the ALJ; the first for failing to timely report its filing of 14 applications for lower power television stations. No motive to deceive was perceived, and the information was finally reported some five months after the applicant became aware of its obligation to file, even though the Commission's rules required that such information must be filed within 30 days. See 47 CFR 1.65. A second slight demerit was awarded because for more than six months Communications' application was not on file in the community of Cape Charles for public inspection as then required by the Commission's rules. However, this fault was not found to be attributable to intentional misconduct or wanton neglect. ID para. 34.

3. Neither applicant received a preference for diversification of control of the media of mass communications. ID para. 30. Thus, the case turned on the extent of proposed participation of each applicant's ownership in management of the station. Communications proposed a full-time participation of 45% of its ownership in management, and 16.95% part time. Mr. Monroe, a 45% stockholder, was to act as full-time general manager and Mr. Hudson, a 16.95% stockholder, was to participate to the extent of holding monthly meetings with Mr. Monroe. Communications did not explain Mr. Hudson's role or what activities he would perform for the proposed station. Since no concrete duties were specified, his monthly participation was found to be consultative in nature, and no credit for this type of part-time participation could be awarded under established Commission policy and precedent. Communications was awarded credit for Mr. Monroe's 45% full-time participation, and

this credit was enhanced because Mr. Monroe is the member of a minority group. ID paras. 31–32, 8–18.

4. Robert Smith is the sole proprietor of the competing application. Mr. Smith will serve as the station's general manager on a full-time basis. Thus, the Smith application was awarded 100% full-time credit which was enhanced because of his broadcast experience. ID paras. 35, 23–26.

5. Communications had claimed that its proposal was entitled to a decisive preference because its 100% Black ownership will provide the first Black-owned station to a county which is more than 50% Black. In his Initial Decision the ALJ found that this contention "does not comport with any of the Commission's comparative criteria. For comparative purposes, the minority element is tied to the applicant's integration proposal. *WPIX, Inc., supra.*" Communications was credited with 45% integration, and that 45% credit was qualitatively enhanced by virtue of Mr. Monroe's minority status. ID para. 32. In his final comparative evaluation, the ALJ did not fault Communications for the two slight demerits. He concluded that Communications' 45% credit, even when enhanced for its qualitative superiority, was not enough to outweigh Smith's clear (55%) quantitative difference which was enhanced for broadcast experience. ID paras. 37–38.

6. *Discussion*: The major point advanced by Communications is that it should have received a decisive comparative preference because of its 100% minority ownership even though only 45% will participate in the management of the station. (Br. 5–8.) We agree with the ALJ that this claimed preference does not comport with any of the existing comparative standards. That conclusion is supported by the Commission's decision in *WPIX, Inc., supra*, as well as recent Commission and Review Board decisions. See *Waters Broadcasting Corp., supra*, 52 RR 2d at 1066–67, see also *Las Misiones De Bejar Television Co.*, FCC 83R-10, 53 RR 2d 119 (Rev. Bd. 1983). We need not belabor this point because in *Las Misiones* a contention very similar to that now advanced by Communications was found to conflict with established Commission policy and precedent. See 53 RR 2d at 121–22.

7. Several of the ALJ's evidentiary rulings are challenged by Communications which maintains that its principals will be more sensitive to the special needs of Cape Charles than its competitor. Br. 3–4. Before they filed their applications both applicants were required to ascertain the community's needs and to design programs to serve those needs. See Commission's "*Programming Policy Statement*," 44 FCC 2303, 20 RR 1901 (1960). Here the showing of both applicants apparently satisfied the basic Commission requirement since an issue was not designated regarding this matter. Thus, under well established Commission comparative practice an applicant claiming sensitivity to the community's special programming needs

and interests had to seek and justify a special issue prior to hearing. See *Policy Statement*, *supra*, 1 FCC 2d at 397–398; *Nuance Corp.*, 85 FCC 2d 412, 421 (Rev. Bd. 1981), and cases cited therein. Here a specific issue was not sought, and the ALJ's rulings, see *e.g.* Tr. 290–293, were mandated by Commission policy and practice as was his refusal to award a special preference for special sensitivity to the community's needs.

8. Finally, both applicants have made several arguments which are peripheral to the case. Communications argues that the ALJ should have faulted Smith's erroneous representation that he put a station on the air in 1973 instead of in September of 1974 so that he in fact operated that station for less than two years instead of three. Br. 9–10. Smith, on the other hand, argues that the ALJ should have faulted Communications not only for its reporting and filing violations, para. 2 above, but also for defects in its financial and transmitter site showings. The ALJ exercised sound judgment in regarding Smith's erroneous representation as of no decisional significance. But even if we were to award Smith a demerit for his error, Smith's demerit would more than be offset by the demerits which Communications received for its own errors. Moreover, the ALJ rejected Smith's claim that Communications was not financially qualified and did not have reasonable assurance that its transmitter site was available. Now Communications has had to file an amendment correcting the location of its transmitter site, which we hereby grant. All of these minor errors by the two applicants, which unfortunately we've come to expect in the litigious comparative process, are of no decisional significance as the ALJ wisely concluded. We affirm his exercise of sound judgment and common sense. See *Las Misiones*, *supra*, Note 1.

9. *Summation*: Since 1965, the *Policy Statement*, *supra*, and cases applying it have established that comparative credit for ownership participation will be awarded in proportion to the quantity of ownership which will participate full time in the management of the proposed station. Communications' credit for 45% ownership participation means that less than controlling interest will be involved full time in the management of the station. When an owner does not have ultimate control he is far less likely to respond with dispatch to changing circumstances, *Policy Statement*, *supra*, 1 FCC 2d at 395–96. Thus the benefit of such participation in management is naturally lessened. On the other hand, Smith's 100% ownership proposal is entitled to a substantial preference, even when viewed against Communications' significant weight for minority ownership. Minority enhancement credit cannot overcome the very participation preference of which it is a part, although an important one. Compare *Waters Broadcasting*, *supra*. Smith's quantitative superiority is also slightly enhanced because of his broadcast experience.

Policy Statement, 1 FCC 2d at 396. We therefore affirm the ALJ's grant of Smith's application.

10. ACCORDINGLY, IT IS ORDERED, That HLD & M's petition to amend and reopen the record filed December 13, 1982 and its petition for leave to file reply filed January 11, 1983, ARE GRANTED, and its motion to strike opposition filed January 6, 1983, IS DISMISSED as moot;

11. IT IS FURTHER ORDERED, That the Mass Media Bureau's Motion to Dismiss filed on November 8, 1982 IS DENIED, and its Contingent Reply to Exceptions IS ACCEPTED;

12. IT IS FURTHER ORDERED, That the application of HLD & M Communications, File No. BPH-800508AA, IS DENIED, and the application of Ronald Smith, File No. BPH-800827AI, IS GRANTED.

JOSEPH A. MARINO *Chairman, Review Board*

FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HLD & M COMMUNICATIONS Cape Charles, Virginia	BC Docket No. 81-429 File No. BPH-800508AA
RONALD SMITH Cape Charles, Virginia	BC Docket No. 81-430 File No. BPH-800827AI
For Construction Permit for a New FM Station	

Appearances

Louis Ebert, Robert B. McKenna and *Leon T. Knauer* on behalf of HLD&M Communications; *Ray R. Paul* on behalf of Ronald Smith; and *Norman Goldstein* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge Jonn M. Frysiak

(Issued: September 2, 1982; Released: September 10, 1982)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of HLD&M Communications (HLD&M) and Ronald Smith (Smith) for authority to construct and operate a new FM station on channel 241 at Cape Charles, Virginia. By *Order* (BC 001941) released July 8, 1981, the captioned applications were designated for hearing on the following issue:[1]

1. To determine with respect to HLD&M Communications:
   (a) the source and availability of funds to meet anticipated costs; and
   (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified to construct and operate the proposed FM facility.

2. To determine whether HLD&M had maintained a public file in the community of Cape Charles as required by the Commission's

[1] Issues 2 and 3 were added by *Memorandum Opinion and Order* FCC 81M-3144, released October 5, 1981.

Rules, and, if not, whether such failure to maintain a public file in the community adversely reflects upon the comparative qualifications of HLD&M.

3. To determine whether HLD&M properly amended its application for the FM station at Cape Charles, Virginia in File No. BPH-800508AA in accordance with the requirements of Section 1.65 of the Commission's Rules to reflect its pending applications for low power television stations in Houston, Texas, Detroit, Michigan, Atlanta, Georgia, Tampa, Florida, St. Louis, Missouri, or any other applications for other cities, and, if not, whether the failure to file such amendments in accordance with the requirements of Section 1.65 of the Commission's Rules adversely reflects upon the comparative qualifications of HLD&M.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

The *Order* provided that "for the purpose of comparison, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to either of the applicants" (para. 5).

2. A prehearing conference was held on October 1, 1981. By *Orders* FCC 82M-0987 and FCC 82M-1003, released March 29, 1982 and March 31, 1982, respectively, summary disposition of HLD&M's financial issue was rendered. Hearing sessions were held in Washington, D.C. on March 30 and 31, 1982 and April 14, 1982. Proposed findings of fact and conclusions of law were filed by the applicants on June 1, 1982 and replies were filed on June 14, 1982 by HLD&M and on June 15, 1982 by Smith.

Findings of Fact

Section 1.65 Issue Directed Against HLD&M

3. At the time of filing its application, HLD&M had on file four applications for low power television stations on an experimental basis. These applications were duly reported to the Commission in the Cape Charles construction permit application. The applications were withdrawn when it was learned that the Commission would not grant low power applications on an experimental basis. Low power applications in the fourteen cities specified in a March 5, 1982 amendment to HLD&M's application were then filed under the Commission's interim processing guidelines for low power stations.

These applications were filed in November and December 1980 and January and February 1981. Mr. Early Monroe testified that HLD&M's failure to amend its permit application to reflect the withdrawal of its experimental applications and the filing of the low power applications was based on his misconception of the Commission's reporting rules. He averred that he felt that having applied for the experimental stations with the same agency at which the application for a construction permit was filed, no additional notification was required. HLD&M Exh. 1, p. 5.

Local Public File Issue Directed Against HLD&M

4. On page 9 of its Exhibit 1, through the written direct testimony of Mr. Monroe, HLD&M reports that a copy of its application for Cape Charles, Virginia has been on file for public inspection since May 1980 at the Northampton Service Station in Cape Charles. Mr. Raymond Spady, the owner of the Northampton Service Station, testified on direct that on or about May 15, 1980, Mr. Monroe delivered to him a copy of the HLD&M application and that it was maintained and available for inspection at his station during regular business hours. HLD&M Exh. 5. On cross-examination, he stated that there was one occasion that the application was not in the public file and that he asked his brother two or three days later about it and was told that his brother had given it "to the people for them to see" (Tr. 224); that it was then that he "knew that the files were gone and [he] didn't misplace the files, and then [he] had to get some more." Tr. 240.

5. In her rebuttal testimony, Ms. Frances Shepherd testified that she is an employee at WHAG-TV and that on September 29, 1981 she was requested by Mr. Smith to inquire of Mr. Spady by phone whether the public file was available. She made the call and was told by a person who identified himself as Mr. Spady that he didn't know what she referred to, but after being told what it was, he remembered that it was received the previous week. Tr. 97–98.

6. On January 4, 1982, Mr. Earl Gerhart, an employee of WQZQ, Chesapeake, Virginia, at the request of Mr. Smith, personally visited the Northampton Service Station and requested to see the file. He was told by Mr. Spady that he did not have it and had not seen it for several months. On January 6, 1982, Mr. Gerhart called the station to speak with Mr. Spady and was informed that he was not in. A person who identified herself as "Dorothy" had said, when asked about the file, that someone else had been there and it had not been seen for several months. On March 17, 1982 Mr. Gerhart called again, spoke with Mr. Spady and was told that the file had been found and that "they also brought down another duplicate file." Tr. 104–09.

7. In late September or early October 1981, Mr. George B. Sterling, a reporter for *The Eastern Shore News*, which has circula-

tion in Cape Charles and Northampton County, went to the service station to inspect the file. The attendant did not know what he requested to see. In December 1981, Mr. Sterling made a second trip to inspect the file, and again on this occasion the person did not know of the file and did not locate it. On Mr. Sterling's third trip to the service station during March 1982, the public file was there and he had an opportunity to inspect it for the first time. Tr. 274–77.[2]

The Applicants

HLD&M Communications

8. HLD&M is a general partnership as follows:

Name	*Office Held*	*Percentage of Ownership*
James L. Hudson	President	16.95
Willie L. Leftwich	None	16.95
Chester C. Davenport	Secretary/Treasurer	16.95
Keith Seay	None	4.15
Early D. Monroe, Jr.	Vice President	45.00

All of the partners of HLD&M are black. With the exception of Mr. Monroe, the partners are also partners in the law firm of Hudson, Leftwich & Davenport, located at 1101 15th Street, N.W., Washington, D.C. HLD&M Exh. 1, p. 3; Exh. 2, p. 1; Tr. 52–54, 297.

9. Mr. Monroe, who currently resides in Arlington, Virginia, testified that if HLD&M's application is granted, he would move to the Cape Charles area to personally manage the station on a full-time basis. HLD&M Exh. 1, p. 5; Tr. 44.

10. Mr. Monroe participated in graduate studies at Howard University and George Washington University in Washington, D.C. in engineering and telecommunications management, respectively. HLD&M Exh. 1, p. 1.

11. From 1966 to 1979, Mr. Monroe was employed by the Federal Communications Commission. In 1966–1968, he worked as an Audio Broadcast Engineer in the Broadcast Bureau, concentrating on low power radio stations. From 1968 to 1970 he worked as a Television Broadcast Engineer, concentrating on, *inter alia*, conventional television stations and low power television stations (*e.g.*, translators and Instructional Fixed Television Stations). In 1970 he became the Commission's Cable Television Task Force Engineer where his primary duties included writing and modifying the Cable Antenna Relay Service (CARS) rules, processing CARS applications and writing the cable television technical standards, a position he held until 1974. In 1974 Mr. Monroe became Senior Engineer for the

[2] Mr. Sterling appeared as a witness for Smith under subpoena "against [his] wishes." Tr. 281.

Cable Television Bureau, responsible for technical matters in the Policy Review and Development Division. He researched and coordinated the Commission's policy decision to allow energy efficient small diameter satellite earth terminals by cable television systems and spearheaded the research concerning energy leakage from cable television systems which resulted in federal energy leakage rules for the cable industry. He remained in this position until he left the Commission in 1979. HLD&M Exh. 1, pp. 1–2.

12. From 1972 to 1978, Mr. Monroe was an adjunct professor at Howard University's School of Communications, where he taught New Communications Technology, Cable Television and Urban Communications. HLD&M Exh. 1, p. 2.

13. In 1978–1979, Mr. Monroe founded the National Organization of Telecommunications Engineers and Scientists (NOTES) for the purpose of promoting and supporting technological developments and energy conservation in telecommunications. HLD&M Exh. 1, p. 2.

14. Mr. Monroe is chairman of the board and president of NOTES, a member of IEEE and former vice president of its Washington, D.C. broadcast chapter. He is also a member of the Society of Professional Engineers, the Society of Cable Television Engineers and co-chairman of the National Conference of Black Lawyers Communications Task Force Broadcast Group. He was a member of the Commission's Teletext/Viewdata Committee which is responsible for monitoring developments and coordinating activities in this spectrum and energy efficient mode of telecommunications transmission. He is also a member of the Kentucky Educational Television TeleCom Planning Committee, a group established to prepare a report identifying a more current energy efficient telecommunications system for the state of Kentucky. He is a member of the Congressional Black Caucus Brain Committee, which is responsible for drafting reports to the caucus on legislation affecting the black community, a member of the NAACP and the National Urban League, where he serves on the Consumer Affairs Committee. HLD&M Exh. 1, pp. 2–3.

15. Mr. Monroe is the author of a number of technical and nontechnical policy, educational and instructional papers on telecommunications, the most recent of which are: "Studio and Control Equipment—Technical Aspects," published as a chapter on the educational textbook, *Television Broadcasting*, edited by Dr. Robert Hillard, Hasting House, 1978; "Interfacing Cable Television and Broadcast Subscription Television," published in *Cable 78 Technical Papers 27th Annual NCTA Convention*, NCTA, Washington, D.C.; "Deregulating the Cable Technical Standards," published in *Annual NOTES Technical Papers*, 1980. HLD&M Exh. 1, p. 3.

16. Currently, Mr. Monroe is president of EDM and Associates, Inc. EDM specializes in broadcast, cable, common carrier and

microwave services. In addition, he is vice president of HLD&M Communications. HLD&M Exh. 1, p. 3.

17. James L. Hudson is a graduate of Morehouse College and the Boston University Law School. He has been a senior partner of the law firm since its inception in 1969. He is a member of the Board of Directors of the Washington Council for Equal Business Opportunity, the Executive Committee of the Lawyers Committee for Civil Rights Under Law, the Executive Committee of the World Peace Through Law Center, the Economic Development Bureau Steering Committee of the Washington, D.C. Board of Trade, the National Tenants Rights Organization, the Washington Planning and Housing Association, Model Cities Clean Services, Inc., Health and Welfare Council United Givers Fund, the Municipal Finance Forum of Washington, D.C., the Advisory Board of the District of Columbia National Bank, and the District of Columbia General Hospital Commission. Additionally, he has been active in national and local politics. In 1972 Mr. Hudson was Michigan State Coordinator for Senator Edmund S. Muskie's presidential campaign. In 1976 he was a member of the Carter-Mondale Steering Committee District of Columbia. In 1974 he was the vice chairman of the Walter E. Washington mayoral campaign. HLD&M Exh. 2, p. 2.

18. As president of HLD&M, it is Mr. Hudson's intention that if the license is granted, he will have monthly meetings with the general manager, Mr. Monroe, as to all aspects of station management, programming and policies. Although he has no previous broadcast experience, he believes that his management experience developed in running Hudson, Leftwich & Davenport, particularly in determining salaries, balancing revenues against outlays, collecting accounts receivable and assigning workloads, will enable him to participate effectively in the management of the radio station. He also believes that his sensitivity to the needs of the minority community will assist the station to fulfill some if not all of the needs of the local population expressed in the ascertainment study conducted by HLD&M. HLD&M Exh. 2, p. 3. Although part-time credit for Mr. Hudson's integration into management is sought, no work schedule was specified.

19. Willie L. Leftwich has a B.S.E.E. from the Howard University School of Engineering and a J.D. and LL.M. from the George Washington University School of Law. Between 1971 and 1973, Mr. Leftwich was an associate professor at the George Washington University School of Law and the University of the District of Columbia. From 1968 to 1969, Mr. Leftwich was employed at the Federal Aviation Administration, U.S. Department of Transportation, as a patent attorney. Between 1963 and 1968, he was a research electro-optical engineer for the Naval Air Systems Command and a research aeronautical instrumentation engineer for the National

Aeronautics and Space Administration between 1960 and 1963. HLD&M Exh. 2, p. 3.

20. Mr. Leftwich's civic participation includes: Director, Neighborhood Legal Service Program (1973–1974); Secretary of the Commerce Technical Advisory Board (1974–1976); Federal Energy Administration Wholesale Consumer Panel (1974–1976); District of Columbia Law Revision Commission (1978); Director, Pennsylvania Avenue Development Corporation (1973–1976); Director, District of Columbia Redevelopment Land Agency (1971–1976); Member, District of Columbia Judicial Nomination Commission (1975–1980); Member, Defense Science Board Task Force on Revision to Acquisition Directives (1979). Furthermore, in 1972 Mr. Leftwich was the Chairman of the District of Columbia Committee to Re-elect the President of the United States, Richard M. Nixon. HLD&M Exh. 2, p. 4.

21. Chester C. Davenport joined Hudson, Leftwich & Davenport in 1973 after a federal government career with the U.S. Department of Justice and as a legislative assistant to United States Senator Alan Cranston. In 1976 Mr. Davenport temporarily left the firm to be a coordinator for the Carter-Mondale Presidential Campaign Policy Planning Group. He then served from 1976–1977 as a member of President-Elect Carter's Transition Team. From 1977–1979, Mr. Davenport served for President Carter as Assistant Secretary of Transportation for Policy and International Affairs, U.S. Department of Transportation. In this position, he was responsible for the analysis, development, articulation and review of all policies and plans for domestic and international transportation. He then rejoined the law firm in 1979 as a senior partner. HLD&M Exh. 2, pp. 4–5.

22. Keith A. Seay is also a partner with Hudson, Leftwich & Davenport and is head of its real estate division. Mr. Seay's expertise in the area of real estate acquisitions, leases and zoning will prove valuable to the station. HLD&M Exh. 2, p. 5.

Ronald Smith

23. Ronald Smith is the sole proprietor of his application. He was born in Baltimore, Maryland in 1939 and was graduated from Catonsville High School in 1957. While in high school, he was the school's representative to Boy's State in Annapolis in 1956 and was elected treasurer of the Student Council in his senior year. After graduation from high school, he attended Baltimore Junior College for one year while working in broadcasting. His non-broadcast employment consists of a position as production manager for Langsdale Advertising in Baltimore from 1960 to 1962 and as vice president and production manager for Art Associates, Inc., a division of Merkle Press. In 1961 Mr. Smith attended the University of Baltimore where he took special courses in advertising, copyrighting

and layout. In 1970 he moved to Hagerstown, Maryland, where he was employed by Adler Communications Corporation, and has resided in Hagerstown since that time. He has been a member of the Hagerstown-Washington County Chamber of Commerce, the Hagerstown Lions Club, and has served on the Board of Directors of the Washington County Council on Alcoholism. Smith Exh. 2, pp. 1–2.

24. While in high school, Mr. Smith worked part time as a junior disc jockey on Saturday mornings at WITH in Baltimore, Maryland. Upon graduation from high school, Mr. Smith was employed as production assistant at WJZ-TV in Baltimore on a "Dick Clark" type dance program, two and a half hours a day, six days a week. During this period of time, he was on the air delivering commercials, supervising teenagers who danced on the program and assisting the director. In 1959 he moved to the eastern shore and worked as office manager and announcer at WICO, Salisbury, Maryland. His duties in this position included a daily four-hour radio program, writing copy and typing logs. In 1960 he moved from Salisbury to Pocomoke City, Maryland, where he was employed at WDVM as program director and announcer. In addition to his duties as program director, he performed a four-hour daily radio program, wrote copy and did general office work. During the latter part of 1960, he was forced to leave broadcasting because of a physical problem with his vocal cords which caused his voice to crack after he had talked for a few hours on the air. Smith Exh. 3, p. 1.

25. In 1967 Mr. Smith was one of the founders of and minority stockholders in Adler Communications Corporation. This company purchased WHAG AM-FM, Hagerstown, Maryland, in 1967; WAYE, Baltimore, Maryland, in 1968; and put WHAG-TV, Hagerstown, Maryland, on the air in 1970. Mr. Smith was employed as executive vice president of Adler Communications Corporation and was responsible for the entire operation of each broadcast facility, including programming, sales, production, traffic, promotion and engineering. At one time or another between 1967 and 1973, Mr. Smith worked on a day-to-day basis as general manager of all the Adler stations. In 1973 WHAG-TV was sold, at which time Mr. Smith resigned from Adler. He continued to serve in a sales capacity at WHAG-TV from 1972 to the present. From 1970 to 1976, Mr. Smith was president and majority stockholder in Community Broadcasters, Inc. This company put WAAT-FM, Johnstown, Pennsylvania, on the air in 1974. Due to financial difficulty, the station was sold in 1976. Smith Exh. 3, pp. 1–2; Tr. 183–4.

26. Mr. Smith is currently a resident of Hagerstown, Maryland. Smith Exh. 2, p. 2. In the event that his application is granted, he will move to the Cape Charles area of the eastern shore of Virginia and will serve as the station's general manager on a full-time basis, devoting at least 40 hours per week to the station's operation and whatever additional time is necessary to fulfill the responsibilities

and duties inherent in the position of general manager. Mr. Smith will make the day-to-day programming decisions and other managerial decisions of the station. Smith Exh. 4.

Emergency Power Generator

27. Both applicants propose to install an emergency power generator to supply power in the event of a power failure. HLD&M Exh. 1, p. 9; Smith Exh. 6.

Comparative Coverage

28. Although the applicants do not propose the same transmitter site, a distance of approximately 500 feet separates the two sites and the areas and population to which the proposed stations would render service will be the same, *i.e.*, 716,790 persons residing in 1,174 square miles. HLD&M Exh. 8.

Conclusions of Law

29. This proceeding involves the mutually-exclusive applications of HLD&M and Smith to construct a new FM station at Cape Charles, Virginia. The issues to be resolved in this proceeding are the standard comparative issue and the special comparative issues designated against HLD&M, which include a Section 1.65 issue for its failure to report by amendment its 14 applications for low power television permits and a public file issue for its failure to maintain a local file containing its application in accordance with Section 73.3580(f)(9) of the Commission's Rules. The applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement*, 1 FCC 2d at 394.

Diversification of Control of the Media of Mass Communications

30. Neither of the applicants, nor any of HLD&M's principals, has present interests in the media of mass communications. None of HLD&M's low power television applications has been granted and none, therefore, is attributable to HLD&M for comparative purposes.

Best Practicable Service

31. HLD&M proposes 45% full-time integration of ownership and management and 16.95% part-time integration. Mr. Monroe, a 45% shareholder and vice president of HLD&M, is proposed as a full-time general manager. Mr. Hudson, a 16.95% shareholder and president, will hold monthly meetings with Mr. Monroe. Mr. Hudson has no previous broadcast experience and has no specific duties in the management of the station. Although it has been stated that Mr.

Hudson's management skills acquired in the management of a law firm will assist him in the management of the radio station, there is no evidence as to what activities Mr. Hudson will perform, if any. Since no duties are delineated, Mr. Hudson's participation is deemed to be of a consultative nature. Furthermore, there is no indication of what duration Mr. Hudson's monthly meeting with Mr. Monroe will be. In *Midwest Broadcasting Company*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979), the Review Board, stating that the *Policy Statement* (*supra*) makes it quite clear that while the Commission is primarily interested in full-time participation, it set a cut-off point of 20 hours a week below which no credit will be given for part-time integration proposals. Since Mr. Hudson's work hours have not been specified, no credit for his part-time participation can be given.

32. HLD&M's proposal is qualitatively enhanced by the participation of Mr. Monroe, who is a member of a minority group. *WPIX, Inc., New York*, 68 FCC 2d 381, 43 RR 2d 278 (1978). HLD&M contends that its proposal is superior to Smith's because it is 100% black-owned and will provide the first black-owned communications outlet to a county more than 50% black. This statement does not comport with any of the Commission's comparative criteria. For comparative purposes, the minority element is tied to the applicant's integration proposal. *WPIX, Inc., New York, supra*. HLD&M can only be credited with 45% integration, and that 45% integration is qualitatively enhanced by virtue of Mr. Monroe's status as a black.

33. *Section 1.65 Issue.* Item 17(b) on page 5 of Section II (Legal Qualifications) of FCC Form 301 requires the reporting of an applicant's interest in any applications pending before the Commission. The findings of fact demonstrate that HLD&M did not amend its application to include 14 applications for low power television stations. Although HLD&M appears to be in technical violation of the Commission's reporting rules, there is no evidence of any motive to withhold the information. The record does indicate that HLD&M made such a report on March 5, 1982, some five months after it was alerted to the omission[3] HLD&M will be assessed a slight demerit.

34. *Public File Issue.* The record shows that on occasions between September 1981 and early March 1982, the application of HLD&M was not on file in the community of Cape Charles for public inspection. There is no evidence of intentional misconduct or wanton neglect. Nevertheless, the application was not available for public examination when certain members of the public attempted to see it. A slight demerit against HLD&M will be assessed.

35. Ronald Smith is the sole proprietor of his application. He will serve as the proposed station's general manager of a full-time basis. Smith is entitled to a 100% integration of ownership and manage-

[3] The comparative issues against HLD&M were enlarged on October 5, 1981 to include the Section 1.65 issue.

ment credit. This credit is qualitatively enhanced by virtue of his past broadcast record.

36. *Other Comparative Factors.* Neither of the applicants is entitled to a comparative coverage preference since there is essentially no difference in the areas or populations proposed to be served by HLD&M and Smith. In addition, both of the applicants receive a preference for proposing to install an auxiliary power generator.

Final Comparative Evaluation

37. HLD&M is entitled to 45% quantitative integration credit. Smith is entitled to 100% integration credit. The grant, therefore, must go to Smith since it is settled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981).

38. In any event, the Smith proposal is qualitatively superior to that of HLD&M. HLD&M's proposed integration of a 45% owner who is black is outweighed by Smith's 100% integration enhanced by past broadcast experience.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Ronald Smith to construct a new FM broadcast station at Cape Charles, Virginia (File No. BPH-800827AI) IS GRANTED and the application of HLD&M Communications (File No. BPH-800508AA) IS DENIED.[4]

JOHN M. FRYSIAK *Administrative Law Judge*

FEDERAL COMMUNICATIONS COMMISSION

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Common Carrier, Data Processing Service
Common Carrier, Interconnection
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, International Record Carrier
Tariff, Regulation of

Under Section 222 of the amended Act, record carriers are required to interconnect facilities with one another. Order resolves interconnection to store-and-forward and service conversion facilities. Also, the Commission clarifies that interconnection is required to "traditional" record services, even if they are enhanced services which otherwise would be unregulated.
-Interconnection Arrangements
CC Docket No. 82-122

FCC 83-85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Interconnection Arrangements Between and Among Domestic and International Record Carriers: Store-and-forward and TWX/Telex Conversion	CC Docket No. 82-122

MEMORANDUM OPINION AND INTERIM ORDER

(Adopted: *March 3, 1983*; Released: *March 14, 1983*)

BY THE COMMISSION:

I. *Introduction*

1. In the Record Carrier Competition Act of 1981 (RCCA), P.L. 97-130, 95 Stat. 1687, Congress amended Section 222 of the Communications Act to establish a new structure for full and fair participation in the provision of international and domestic record services. Included is a requirement that facilities for teletypwriter-based (and other traditional) record services by record carriers be made available for interconnection with facilities of other record carriers. The RCCA contemplated that the affected carriers meet and reach interconnection agreements to implement interconnection for others which is equal in type and quality to that provided their own operations, and if they were unable to do so, that the Commission prescribe appropriate tariff, compensation, technical and operational arrangements for such interconnection.

2. The Commission sponsored meetings among the carriers thereafter, but the carriers were unable to reach such agreements. Thus, the Commission was forced to prescribe appropriate arrangements in an April 8, 1982 *Interim Order* [1] and in a June *Memorandum Opinion and Order (Rejection Order)*[2], employing a tariff prescription mechanism to ensure that the prescribed arrangements were effectuated. Pursuant to these orders, the vast bulk of domestic and international teletypewriter-based record services are now fully interconnected.

3. Although the carriers had been unable themselves to reach comprehensive interconnection agreements, and had forced the Commission to embark upon the prescription path, the Commission sponsored additional meetings subsequent to adoption of the *Interim Order* in an effort to promote voluntary resolution of the non-compensation technical and operational details of interconnection. As is summarized in the *Rejection Order*, many such issues were resolved during the course of these meetings, and formed the basis for prescription in the *Rejection Order*. However, the parties were unable to do so with respect to store-and-forward and TWX/Telex conversion interconnection because of their technical complexities and the need for additional Commission guidance.

4. For this reason, contemporaneously with release of the June order, the Chief, Common Carrier Bureau released a *Tentative Decision* [3] which summarized the carriers' discussions of the store-and-forward and TWX/Telex interconnection issues at the meetings and proposed resolution of these issues. Comments filed in response showed that several carriers were prepared to implement the proposals in the *Tentative Decision*. However, one carrier, TRT, claimed that it was unable to do so without extensive and time-consuming facilities modifications. And, two carriers, WUI and ITT, argued in favor of additional meetings among the carriers to discuss these issues further. In these circumstances, the Chief, Common Carrier Bureau concluded that it would be desirable to sponsor additional meetings to resolve the store-and-forward and TWX/Telex conversion interconnection issues, and by *Order* released July 6, 1982, CC5003, convened such meetings July 13 and 14, 1982 (hereafter the July meetings). At the July meetings, the carriers drafted consensus language, but they reserved the right to assent or dissent thereto subsequently. However, their language utilized principles which were inconsistent with those advanced in the *Tentative Decision*, and for that reason by letter to each of the carriers dated July 21, 1982, further comment was requested on the

[1] 89 FCC2d 988 (1982).

[2] *91* FCC2d *483*, FCC 82-264, released June 11, 1982.

[3] Tentative Decision, CC4563, released June 11, 1982.

necessity for the arrangements addressed in the carriers' consensus language.

5. In view of the comprehensive comments before us, filed pursuant to the *Tentative Decision* and in response to the Bureau Chief's July 21, 1982 letter, we are prepared to resolve on an interim basis the store-and-forward and TWX/Telex interconnection issues.

6. However, a related matter has arisen which also must be addressed, namely the relationship of this proceeding to Section 64.702(a) of our rules, which became effective January 1, 1983 as the result of the *Second Computer Inquiry* [4]. In Transmittal No. 7992, Western Union has sought to detariff certain store-and-forward and service conversion offerings heretofore tariffed on the theory that these are enhanced services and therefore not properly the subject of tariffs. Certain of the offerings within the scope of Western Union's filing are within the ambit of the store-and-forward and TWX/Telex conversion issues of this proceeding, and we therefore must resolve whether the tariff mechanisms employed to implement the RCCA appropriately may be employed for such store-and-forward and service conversion offerings.

II. *The Tentative Decision*

7. The *Tentative Decision* identified and proposed resolution of significant complications which foreclosed the ability of the record carriers themselves to resolve interconnection to store-and-forward and TWX/Telex conversion facilities. We briefly summarize the proposals in the *Tentative Decision* below.

A. Proposed Treatment of Store-and-Forward Interconnection

8. The *Tentative Decision* addressed solely interconnection of one carrier's switched telegraph services with the input of another carrier's store-and-forward facilities, the latter of which are integral to the second carrier's telegraph-based and traditional telegraph service offerings. It did not address the correlative possibility that the output of store-and-forward facilities might be connected to another carrier's facilities, as this matter had not been raised or addressed during the course of the carriers' meetings[5].

9. Several issues were identified in the *Tentative Decision* which,

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[4] 77 FCC2d 384, 84 FCC2d 50 (1980), 88 FCC2d 512 (1981), *aff'd sub. nom*, C.C.I.A. v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982), *petitions for certiori filed*, —USLW— (U.S. Feb. 9 and 10, 1983, Nos. 82-1351 and 82-1352).

[5] We similarly do not propose to address this case in this order, but without prejudice to whether carriers may, or should, themselves arrive at suitable procedures for interconnecting the outputs of store-and-forward facilities to other carriers' facilities. As was noted in the Tentative Decision, para. 4 note 2, outputs from Western Union's "Infomaster" appear currently to be interconnected to other carriers' international facilities for international handling. Similarly, outputs of international record carriers' store-and-forward facilities may already be connected to other carriers' facilities for message handling on a transit basis. In

because of controversy among the carriers, foreclosed their ability to resolve store-and-forward interconnection. These were: discrepancies in actual input time and output time when store-and-forward messages are handled; disparate treatment by the Commission and the carriers of international and domestic minutes; and identification of which carrier is the "originating carrier" (i.e., the carrier which bills the subscriber and which compensates the interconnected carrier for use of its facilities). A further issue concerned whether a store-and-forward transmission should be treated as two calls (i.e., one to the store-and-forward facilities, and a second from these facilities to the destination) or as a single call (i.e., a single call from the originator to the destination, ignoring the intermediate storage), and whether the carrier compensation arrangements should be consistent with such a two call or one call treatment. And finally, there was an attempt in the *Tentative Decision* to address the claims of several carriers that a unified treatment of store-and-forward interconnection for all carriers alike would be infeasible, as various carriers had claimed that they could not implement various options which had been discussed at the meetings preceding release of the *Tentative Decision*.

10. The *Tentative Decision* proposed that the carrier bringing messages to another carrier's store-and-forward facilities should be compensated on the basis of input time to the store-and-forward facilities, as such time represents the actual usage of the interconnecting first carrier's facilities. One way of achieving this result would be to place such calling on a subscriber-paid basis, i.e., that the subscriber would compensate the first carrier no differently than it would compensate this carrier for any other domestic call. While it appeared that Western Union was able to implement such an arrangement for calls toward its store-and-forward facilities from other carriers' subscribers, the other carriers sought to avoid such a subscriber-paid approach in calling toward their own store-and-forward facilities as they claimed that such an approach could not be implemented using the same interconnection arrangements used for realtime services. The ability of their customers to access their store-and-forward and real-time services alike, using the same carrier-paid access ports, would be foreclosed under a subscriber-paid interconnection arrangement. Moreover, many international store-and-forward calls start as real-time calls and revert to store-and-forward if they cannot be completed real-time (for example, if a busy signal is reached). It would be difficult to permit such reversion if different access arrangements were required for the two types of calls.

11. To meet these concerns, the *Tentative Decision* proposed an additional carrier-paid interconnection option, with compensation by

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sum, this form of interconnection appears already to exist, at least to some extent, and may raise no special problems requiring further FCC action.

the store-and-forward carrier to the interconnecting carrier for use of the latter's facilities, but subject to certain constraints. First, the Commission had to receive adequate assurance that reporting of usage minutes would be accurate and verifiable in such arrangements. And second, to ensure that subscribers would be treated alike regardless of which of the two arrangements might be selected, *Tentative Decision* proposed non-application of a carrier interconnection discount to the carrier-paid option. Under this latter constraint, the carrier bringing traffic to another carrier's store-and-forward facilities would receive the same compensation regardless of which option might be selected.

12. In sum, both options would achieve domestic treatment of the compensation of the interconnecting carrier (the subscriber's carrier bringing traffic to another carrier's store-and-forward facilities) based on the actual time the interconnecting carrier's facilities are used in interconnected store-and-forward service, that is, based on input minutes. The *Tentative Decision* concluded that such an approach would best comply with the directive in the RCCA that we establish an "equitable allocation of revenues . . . based on the costs of the record communications service or facility *employed*", Section 222(c)(2) [emphasis added], on the theory that such actual time represents the time in which the interconnecting carrier's facilities are "employed." Furthermore, the *Tentative Decision* noted that many store-and-forward messages are common text multiple-address messages (so-called "book" messages) in which input time often is far less than output time. In such circumstances, any compensation approach for the interconnecting carrier based on store-and-forward output time might result in excessive compensation to the interconnecting subscriber's carrier. We noted that while the carriers themselves might not be particularly concerned over such potential overcompensation, it is subscribers who would provide the funds and not the carriers. Thus, even if the carriers might not perceive a competitive disadvantage from such rate practices, it was unclear whether such practices could be reconciled with the substantive requirements of Sections 201(b) and 202(a) of the Act.

B. Proposed Treatment of TWX/Telex Conversion Interconnection

14. TWX/Telex conversion presented different problems. For purposes of this discussion we are focusing on real time conversion issues, and not conversions which might be performed as part of a store-and-forward offering[6].

[6] Store-and-forward facilities do not necessarily store and subsequently deliver messages unchanged. They also often change the outputs into different forms than those received at their inputs, and are capable of performing TWX/Telex and other conversions on a store-and-forward basis. We address this latter type of conversion offering in connection with our resolution of store-and-forward interconnection.

15. Historically, TWX has been offered solely in the United States and Canada as a teletypewriter exchange service. Telex has been offered worldwide (including the United States and Canada). The two services differ both in speed and in code. TWX operates at 110 baud using the ASCII character set and code, while Telex operates at 50 baud using an older and less versatile character set and code, the so-called "Baudot" code, which does not include many characters found in the ASCII set. While TWX may be a more useful service domestically, for TWX users to be able to send and receive international messages, speed and code conversions are required for crossover between the two services. Such conversions have been performed both by international record carriers (for international calling to TWX subscribers) and by Western Union (for domestic calling as part of its integration of TWX and Telex domestic services). Conversion equipment is in place for these services and is being used.

16. While Western Union sought to continue to offer interconnection to TWX using its normal ASCII coding and 110 baud speed for international interconnection[7], in its interconnection tariff filings it sought to limit interconnection to TWX for domestic service solely to the Telex-based speed and Baudot code, thereby retaining the TWX/Telex conversion function for domestic interconnection[8]. Western Union did not propose to make any domestic interconnection offering of TWX using the TWX code and speed. This failure to make an actual domestic TWX interconnection offering proved controversial, both to carriers which were contemplating the future offering of competitive domestic TWX services (which argued that the absence of direct TWX interconnection could serve as a barrier to their entering the domestic TWX market), and to at least one other carrier, Graphnet, which claimed already to be offering TWX service. It was argued that by limiting domestic TWX interconnection to the Telex speed and character set, Western Union was nullifying the speed and character set benefits of TWX over Telex through unnecessary and inefficient double conversions (from another carrier's TWX, to Western Union's Telex-like interconnection interface, and back to Western Union's TWX).

17. A number of proposals were made by the carriers during their meetings, and in the *Tentative Decision* we proposed interim adoption of one of Western Union's proposals, without prejudice to determination of broader TWX interconnection issues should controversy remain. Specifically, we proposed acceptance of Western

[7] This offering would continue to allow the international record carriers to perform the TWX/Telex conversions which they have long performed for international calling by TWX subscribers.

[8] The international carriers had not performed such conversion prior to enactment of the RCCA.

Union's proposal that it continue to offer interconnection to its domestic TWX facilities using the Telex code and speed, and that it additionally offer interconnection to its domestic TWX facilities using TWX code and speed, but "without restraint"[9].

18. The effect of such an interconnection offering would be to permit other carriers' subscribers with TWX terminals to receive the full advantages of TWX interconnection, including avoidance of double conversions of TWX to Telex and back to TWX, but to frustrate the ability of other carriers themselves to perform TWX/Telex conversion in lieu of Western Union if their subscribers are using lower-speed non-TWX terminals to receive messages originating at Western Union's TWX subscribers' terminals.

19. We tentatively concluded that, as a practical matter, the only carrier which might immediately be affected by this proposal is Graphnet (which apparently today offers service to subscribers with TWX terminals), and that a "without restraint" offering by Western Union would be usable for direct domestic TWX interconnection between the TWX facilities of Western Union and Graphnet. We concluded that adoption of Western Union's proposed "without restraint" arrangement would not foreclose provision of additional TWX interconnection "with restraint" in the future should an appropriate showing be made, and we proposed that the "without restraint" interconnection offering be made effective without prejudice to the resolution of the "with restraint" issues under the RCCA and the Communications Act generally.

III. *Comments*

20. Comments were filed on the *Tentative Decision* which were divided on the proposed treatment of store-and-forward interconnection, but which generally supported adoption of the TWX/Telex conversion proposals (as interim measures, and without prejudice to the "with restraint" issue). Since the latter were not controversial, they are prescribed at para. 70 below, for reasons stated in the *Tentative Decision*, and are not discussed further herein.

A. Comments on the Tentative Decision

21. Two carriers, Western Union and RCA, were prepared to implement the store-and-forward proposals of the *Tentative Decision*, although Western Union argued that any implication that the store-and-forward carrier unbundle the access component (under a carrier-paid access arrangement) for fully domestic calling is not required under the RCCA[10]. CCI and IRI supported the technical and

[9] "Restraint" is a technical term which refers to the ability of a facility periodically to stop a higher speed signal source. *See* Tentative Decision, para. 35.

[10] Western Union argued that the equal in type and quality provisions, and the

operational proposals for store-and-forward interconnection, claiming that their facilities are fully capable of capturing and utilizing input minutes in calling towards their store-and-forward facilities, but they argued that a carrier-to-carrier interconnection discount should apply in the event that the carrier-paid option of the *Tentative Decision* is selected.

22. TRT and WUI opposed adoption of the store-and-forward interconnection proposals (with ITT specifically concurring in WUI's comments on this point), and argued in favor of utilization of output minutes as a basis for compensation of an interconnecting carrier, an approach which was tentatively rejected in the *Tentative Decision*. They did so on rate structure grounds[11], and TRT argued further that to implement the *Tentative Decision* it would be required to make major modifications to its facilities (requiring at least one year of effort, at a labor cost exceeding $150,000)[12]. WUI noted several ambiguities inherent in the proposals of the *Tentative Decision*, and argued in favor of additional carrier meetings (or an additional round of comments) to resolve these ambiguities. Finally, WUI argued that the disruptive effect of the store-and-forward interconnection proposals was disproportionate to the traffic actually involved[13].

B. The July Meetings

23. In view of the congressional preference for agreement among the carriers rather than FCC regulatory solutions as a means of effectuating the interconnection requirements of the RCCA, and in view of the specific request for additional meetings by WUI with the concurrence of ITT, we scheduled meetings on July 13 and 14, 1982 to afford the carriers a further opportunity, under our sponsorship, to reach agreement on the store-and-forward interconnection issues.

24. At the meetings, the carriers generally continued to advance positions advanced previously in their filed comments, and TRT and

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Commission's requirement that the benefits of carrier-to-carrier interconnection discount be passed along to subscribers, apply only to domestic-to-international interconnection, and not to wholly domestic interconnection.

[11] *I.e.*, that anomalies might be created through an establishment of different rates for the real time and store-and-forward calling to the same point. *See* paras. 10 and 22 of the Tentative Decision.

[12] WUI also argued that certain offerings now available to its store-and-forward subscribers, namely departmental billing (billing disaggregated among a subscriber's departments and functional units) could not be performed if the proposals of the Tentative Decision were implemented.

[13] WUI claimed that store-and-forward traffic is approximately 10% of its total traffic, and that common text multiple-address ("book") messages, which raised policy problems addressed in the Tentative Decision, are only about 10% of the store-and-forward traffic. Thus, the messages that create problems with output-based compensation—the preferred approach of WUI, TRT and ITT—are only about 1% of total traffic. In WUI's view, such a *de minimis* problem should not be dealt with in a way which disrupts ratemaking for all of its traffic, real time and store-and-forward.

WUI discussed in more detail why facilities modifications would be necessary for implementation of the proposals of the *Tentative Decision* (or, failing that, why existing service features might be affected or curtailed). TRT explained that if interconnection of its store-and-forward services alone were involved, it could implement these proposals without facilities modifications. But, in TRT's view, the RCCA requires equality between the store-and-forward offerings made to its own subscribers and the store-and-forward offerings made to interconnecting carriers. If compensation for carriers' interconnection to its store-and-forward facilities were to be based on input minutes, in TRT's view similar two call treatment would be required for offerings to its own subscribers of store-and-forward services; this latter rate pattern cannot be implemented on TRT's existing facilities.

25. WUI did not specifically claim an inability to implement the proposals of the *Tentative Decision*. Rather, it claimed that there would be subscriber confusion as a consequence of the inability to line up specific input-based access charges with specific store-and-forward (output) messages on subscriber bills, and for that reason argued in favor of allowance of an output-based compensation option. FTCC and ITT also argued in favor of output-based compensation, primarily on the basis that a change to input-based compensation would disrupt existing rate structures.

26. The remaining participating carriers did not disagree in principle with the TRT, WUI, FTCC and ITT position that output-based compensation should be permitted as an option, so long as the input-based compensation options of the *Tentative Decision* remained available. And, the relatively recent entrants, CCI and IRI, continued to argue that an input-based carrier-paid option (with the store-and-forward carrier providing the total subscriber bill, and compensating the interconnecting carrier for access) should be treated as a carrier-to-carrier interconnection with an appropriate discount. The more traditional carriers argued against such a discount.

27. TRT then proposed creation of a new option which might to some extent create a mechanism for CCI and IRI to utilize input-based compensation in conjunction with an ability for them (rather than the interconnecting carrier) to bill subscribers for the totality of interconnected store-and-forward service, but which in TRT's view would not specifically be classified as a through service justifying a carrier-to-carrier interconnection discount. Under TRT's proposal, the interconnecting carrier's subscriber would make a collect call towards the store-and-forward carrier's facilities; the store-and-forward carrier would be treated as a called party by the interconnecting carrier; but as is the case of any collect call, the called party (i.e., the store-and-forward carrier) would be billed for the call rather than the originator. Since in TRT's view this would be a species of a

subscriber-paid approach, no discount would apply. Furthermore, since this would be a domestic call to the interconnecting subscriber's carrier, this approach would largely implement the carrier-paid option of the *Tentative Decision*, but on an end-on-end basis.

28. Not surprisingly, CCI and IRI were unsatisfied with this proposal in view of their strenuous argument that an interconnection discount should apply if the store-and-forward carrier performs full subscriber billing in interconnected store-and-forward calling. However, because of rounding effects they were willing to discuss further the merits of TRT's proposal[14].

29. Furthermore, CCI and IRI noted that much of their traffic is "book" message traffic, where output times are often greater than input times. If CCI and IRI were to opt for the TRT-proposed approach, while other carriers opted for an output-based compensation approach, CCI and IRI would provide less compensation to the interconnecting carrier for "book" messages independent of the rounding up effects described previously. In sum, both for individual store-and-forward messages, and for "book" messages, a carrier opting for TRT's subscriber-paid-collect proposal, even without a carrier-to-carrier interconnection discount, would be providing less compensation to interconnecting carriers (and could therefore make its prices more competitive) than a carrier opting for an output-based compensation approach. Since ITT, TRT, WUI and FTCC were specifically advocating the output-based compensation approach, it appeared that many (if not all) of the competitors of CCI and IRI would be subject to the higher compensation costs associated with the output-based compensation approach, thus it appeared that CCI and IRI might have a competitive advantage (at least for a time).

30. In view of this discussion, the carriers agreed to draft language embodying the approaches discussed. Their language proposed that a store-and-forward carrier might select "one or more" of the following options: (1) an output-based compensation option

[14] Specifically, the other carriers noted that international timing includes a rounding up process under which message durations for international messages are rounded to the next whole minute. Because of such rounding, even if a 15% discount is applied to treatment of output-based compensation under the existing principles applicable to real time interconnection, for average length messages carriers selecting the TRT-proposed subscriber-paid-collect option would still be providing less compensation to interconnecting carriers for average-length messages than carriers utilizing an output-based compensation option.

An average length store-and-forward message was claimed to be 2.9 minutes at the input of store-and-forward facilities, and 2.4 minutes at their output. Under an output-based compensation approach, the 2.4 minutes would be rounded to 3, multiplied by 1.3 (the current international to domestic conversion factor) and by 0.85 (the current 15% discount) for an international call—the case of interest to CCI and IRI—resulting in 3.315 minutes of compensation to the interconnecting carrier. By contrast, under TRT's proposal, the interconnecting carrier would receive 2.9 minutes of compensation (without a discount).

under which compensation of the interconnecting carrier would be based on the store-and-forward message outputs (under the factoring and discount principles applicable to real time calls); (2) a subscriber-paid access option under which the interconnecting carrier would place a call to a store-and-forward carrier's facilities no differently than any normal domestic call (with normal domestic billing of the originating subscriber); and (3) a subscriber-paid-collect access option under which the interconnecting carrier would place a call to a store-and-forward carrier's facilities as a domestic call, but would bill the store-and-forward carrier for the call (rather than the originator).

31. Finally, language was drafted to implement an ITT proposal intended to ameliorate the concerns in the *Tentative Decision* about "book" messages if output-based compensation is employed.[15]

32. Specific "agreement" to the drafted language was not reached during the July meetings, inasmuch as several carriers indicated that they would be reviewing the consensus results subsequently. As is noted below in the discussion of the responses filed to the Bureau Chief's July 21, 1982 letter, carriers other than CCI and IRI subsequently expressed satisfaction with the drafted language. Although CCI and IRI had appeared satisfied during the meetings with TRT's subscriber-paid-collect proposal, they subsequently continued to argue in favor of a carrier interconnection discount for such arrangements. Thus, to this extent it is unclear whether "agreement" as such was the result of the July meetings.[16]

C. Responses to the July 21, 1982 Letter

33. On July 21, 1982, the Chief, Common Carrier Bureau addressed a letter to each of the participating record carriers requesting additional information which appeared necessary to ultimate resolution of the issues of the *Tentative Decision*. Questions

[15] Briefly, ITT had proposed that output minutes be divided by an industrywide weighted average of the output/input time ratios for "book" messages, to minimize excessive compensation of the interconnecting carrier in the case of "book" messages, if output-based compensation is otherwise employed. When ITT made this proposal at the meetings, FTCC and WUI claimed that their facilities could not distinguish "book" messages from individual messages, making it impossible for them to identify the outputs to which such a factor could be applied. Western Union and TRT argued that any such industrywide averaging could penalize individual carriers with message patterns significantly different from the industry as a whole. In comments filed subsequently, all commenting carriers urged that this proposal not be adopted.

[16] Under the RCCA, only the primary record carriers (which category does not include CCI and IRI) need reach an "agreement." Since the primary carriers appear to have agreed, the result of the July meetings probably qualifies as an "agreement." However, other carriers are free to seek from the Commission modifications to any "agreement" among the primary carriers, and the Commission may modify an "agreement" on its own motion. In this order, we shall treat the objections of CCI and IRI to the drafted language as a request for Commission modification.

were posed on the following issues: (1) To what extent does the RCCA require a restructuring of a store-and-forward carrier's rates to its own subscribers, if the carrier-to-carrier interconnection proposals of the *Tentative Decision* are adopted, in view of TRT's apparent ability to implement these proposals for interconnection purposes, but not for its own services? (2) What are the bases for TRT's time and cost estimates for modification of its facilities to implement the proposals of the *Tentative Decision*? (3) To what extent would the ability of carriers to perform departmental billing be affected if the proposals of the *Tentative Decision* were made final? (4) What basis is there for distinguishing TRT's subscriber-paid-collect interconnection proposal from other forms of carrier-to-carrier interconnection to which an interconnection discount is applicable, since the interconnection arrangements themselves would appear to be the same as are employed for interconnection purposes? (5) What basis is there for carriers to be able to select "one or more" options simultaneously, rather than a single option, in view of the *prima facie* discrimination which could be the result if multiple options were made available simultaneously?

34. TRT argued that the RCCA requires a direct flow through in its subscriber charges for its payout to an interconnecting carrier connecting with the input of its store-and-forward facilities, and that a different rate structure for its own subscribers would be patently discriminatory and neither at "the same rates and upon the same terms and conditions" nor "equal in type and quality" as required by the RCCA[17]. Western Union argued to the contrary.

35. In Western Union's view, the RCCA would not prevent a carrier from disadvantaging its own subscribers as compared with the service offered other carriers through interconnection. More fundamentally, Western Union took issue with TRT's underlying argument that the RCCA requires that the same rate structure utilized for compensation of interconnecting carriers must be applied to a carrier's own subscribers; in Western Union's view, Section 222(c)(2) gives the rate setting carrier freedom to establish its subscriber rates as it sees fit. While Western Union had previously supported the input-based compensation proposals of the *Tentative Decision*, it had done so in the belief that such a rate structure had no bearing on its subscriber rate structure. If the Commission were to require that the subscriber rate structure conform to the interconnection rate structure, Western Union would be compelled

[17] In response to a question in the Bureau Chief's letter whether the RCCA could properly be construed as intended to prevent prejudice in interconnection offerings, and not advantage, as compared with service offered a carrier's own subscribers, TRT argued that such construction would be inconsistent with the actual language of the statute (i.e., "same" terms and conditions, and "equal" in type and quality).

to select the same output-based compensation approach advocated by TRT and other international carriers.

36. While TRT provided no additional information on the cost estimates provided previously, it provided detailed time and labor estimates for the tasks which, in its view, would be necessary to implement the proposals of the *Tentative Decision*. TRT noted that its systems are unique, that personnel outside of TRT are incapable of performing the requisite modifications, and that even within TRT the number of persons capable of performing such work are limited. Thus, TRT argued that its time estimates could not be shortened. The estimates assumed that the compensation principles of the *Tentative Decision* would govern store-and-forward offerings to its own subscribers[18], and would be the same regardless of which of the two options therein might be chosen. Under a scenario in which all billing (and related) services now performed would continue to be available, task milestones traverse six month to fifteen month periods (with total labor ranging from 41.5 to 51.5 person-months).

37. Alternatively, under a scenario in which full departmental billing capabilities might be lost (i.e., for a component representing input to store-and-forward facilities), task milestones would not exceed six months (with total labor ranging from 18.5 to 23.5 person-months)[19]. It should be noted that not all departmental billing would be lost under the second scenario; departmental billing associated with the outputs of store-and-forward facilities would be unaffected. While we requested information on whether the input (access) portion of overall store-and-forward message billing for typical calls is significant, to determine whether the capabilities which might be lost are important or are *de minimis*, TRT did not provide specific data on this. Rather, it argued that full departmental billing capabilities are important to its subscribers.

38. The fourth group of questions, relating to the rationale for not applying a discount to TRT's proposed subscriber-paid-collect interconnection arrangements, evoked strong argument. TRT argued that discounts should only apply to through service arrangements such as the carrier-paid arrangements employed for real time international services where the second carrier serves as the "originating carrier." TRT's proposal was for an end-on-end service arrangement, on the principle that two calls, rather than a through

[18] As noted, TRT is capable of implementing the Tentative Decision without facilities modification for carrier interconnection purposes. Its time and labor estimates are for the effect required to implement an input-based two-call treatment of store-and-forward offerings to its own subscribers, on the theory that the RCCA would require such a result if such an offering were made for interconnection purposes.

[19] TRT argued strenuously against utilization of the second scenario, claiming that its departmental billing (and related) offerings are desirable to subscribers, and that they represent TRT's competitive edge over other carriers, developed as a result of considerable effort.

call, are involved. CCI and IRI argued that the physical and operational arrangements for implementing TRT's proposal are no different than arrangements already employed for real time services to which a discount applies, and that the same economies which justify a discount for the real time arrangements are available for the store-and-forward arrangements as well.

39. Furthermore, these carriers argued that the stated basis of the *Tentative Decision* for not applying a discount to the carrier-paid proposal—that there should be no rate effects on subscribers regardless of which of the options therein might be chosen—would no longer have any force if the output-based compensation proposal advanced by the other carriers were accepted. In such case there would already be different rates to subscribers if both an output-based compensation option and a subscriber-paid access option were available[20]; an additional interconnection option would not exacerbate the discriminatory effects of such disparities.

40. Western Union acknowledged that such a possibility of discrimination would remain were both input-based and output-based compensation options available, but nevertheless it argued that nonapplicability of a carrier-to-carrier interconnection discount to TRT's subscriber-paid-collect proposal would not affect the analysis of the *Tentative Decision* on this point. ITT argued that the subscriber-paid-collect arrangements proposed by TRT are no different from subscriber-paid (normally billed) arrangements, and therefore should be treated no differently from the latter, i.e., with no discount.

41. Comment on the last question, whether an offering by a single carrier of multiple options simultaneously would raise discrimination problems, was somewhat divided. TRT acknowledged that such an approach would raise "serious questions under Section 202(a)" of the Act, but it argued that the Commission need not rule on this issue unless and until a given carrier sought to do so. In TRT's view, it would be sufficient that the parties are now on notice that such an approach might be considered unlawful. Western Union and ITT argued that such an approach would not be unlawful, and Western Union observed that a carrier's marketing philosophy might cause it to adopt a different approach for access to domestic and international store-and-forward services; in Western Union's view, a carrier's flexibility to do so should not be foreclosed. CCI argued that use of the different options for which language was drafted would be to provide essentially *different* services, therefore such an approach would not be the offering of *like* services at different charges, the usual case of prima facie discrimination. CCI

[20] This would particularly be the case with respect to "book" messages. An output-based compensation approach would generally result in considerably more compensation to the interconnecting carrier than an input-based (subscriber-paid) compensation approach to "book" messages.

argued further that the ability of a carrier to pursue multiple approaches would represent a competitive option in the marketplace, and that the purposes of the RCCA in seeking development of a competitive record service marketplace would better be served if such flexibility were retained.

42. Finally, the commenting carriers addressed the merits of adoption of the language drafted at the July meetings. All commentors argued against adoption of ITT's proposal for factored output-based compensation for "book" messages. ITT, TRT and Western Union argued specifically that the remaining three options should be adopted. CCI and IRI agreed that the technical and operational arrangements embodied in the three remaining options should be adopted, provided that the subscriber-paid-collect option proposed by TRT be recognized as a carrier-to-carrier interconnection option to which a discount is applicable.

IV. *Discussion*

43. We have now received comment on the proposals of the *Tentative Decision*, both in comments filed in response and in the responses to the Bureau Chief's July 21, 1982 letter, and we conclude that we are in a position to resolve the store-and-forward and TWX/Telex interconnection issues now. But first, it is important that we resolve a legal issue which has arisen largely since issuance of the *Tentative Decision*, namely the relationship of implementation of the RCCA to the *Second Computer Inquiry* ("Computer II") which enacted Section 64.702(a) of the Commission's rules.

A. Relationship to Computer II

44. Under Section 64.702(a) of the Commission's rules, enhanced services are beyond the scope of the FCC's Title II regulatory jurisdiction, and for that reason are not properly the subject of tariffs filed pursuant to Section 203 of the Communications Act. The rule defines enhanced services as:

> ". . . services, offered over common carrier facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."

Both the store-and-forward and TWX/Telex conversion offerings which are the subject of this proceeding may, to some extent, be classified as enhanced services within the meaning of Section 64.702(a)[21].

[21] It should be noted that there is a pending FCC proceeding which is broadly addressing protocol conversion issues under Computer II, *Notice of Inquiry on Digital Communications Protocols*, 83 FCC2d 318 (1980). As is developed below,

45. We address first the store-and-forward services. In Computer II, the Commission recognized that store-and-forward technology may be used in a carrier's network for the provision of basic services. In so doing, a distinction was made between the offering of store-and-forward service, and the use of store-and-forward technology, *Final Decision*, 77 FCC2d 384, 421, n. 35 (1980). Use of store-and-forward technology in the provision of basic services is subject to the following parameters:

> ". . . memory or storage within the network is used only to facilitate the transmission of information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system. Thus, in a basic service, once information is given to the communications facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator."

Id. at 420[22]. Record carriers' store-and-forward offerings appear to fall in both such categories.

46. It would appear that many store-and-forward offerings involved in this proceeding are in the nature of use of store-and-forward technology, thus such basic offerings of themselves do not raise Computer II issues. However, many store-and-forward offerings traditionally associated with record services do not necessarily transmit their outputs in the same form as the inputs were received.

47. For example, in the case of "book" messages, a common text is transmitted along with a list of addresses. If the common text alone were transmitted to each addressee, the service probably would represent a use store-and-forward technology to support basic service. But, often, each specific addressee's name and address information is appended to the common text when the message is sent to the addressee. In such case, the message which is delivered is reformatted by the store-and-forward facilities. Subject to pending proceedings (n. 21, *supra.*) this would represent an enhanced service, both by providing "additional, different or restructured information" and by acting on the "format, content, code, protocol or similar aspects of the subscriber's transmitted information."

48. Also, some store-and-forward facilities are employed simultaneously both for store and deliver functions, and for service crossover

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we conclude that the RCCA carves out a limited exception to the broader treatment of such issues in Computer II. Thus, our treatment of such issues herein has no effect on the outcome of this proceeding. Conversely, any order which might be adopted therein will have no effect on the dispositions made in this order.

[22] On reconsideration, we made clear that the phrase "or transmission priorities given by the originator" does not permit the originator or the recipient "to control the progress of information through the network", 84 FCC2d 50, 58 (1980). The phrase was intended to focus on consumer options in obtaining different levels of service quality, and a basic service does not include "the ability of the originator of a message to control storage within the network", *Id.*

functions. For example, Western Union's "Infomaster" facilities accept inputs from TWX and Telex terminals for delivery to high speed printers at Post Offices for Mailgram service. Not only is a store and deliver function performed (which, as noted, of itself would be basic, at least for individual unreformatted messages), but also code and protocol conversion as well. This type of conversion, which is somewhat similar to the TWX/Telex conversions addressed more specifically in this proceeding, i.e. the real time "with restraint" and "without restraint" conversions, is enhanced.

49. Conversion between TWX and Telex, regardless of whether performed at the output of store-and-forward facilities or real time, is a code (and, more broadly, protocol) conversion, as TWX employs the ASCII code, and Telex employs the Baudot code. Thus, the offering of TWX/Telex conversion service is an offering of an enhanced service under our rules.

50. But, while the foregoing forms of store-and-forward service and TWX/Telex conversion are enhanced services within the meaning of Section 64.702(a) of the Commission's rules, they also are arguably traditional record service offerings within the meaning of the RCCA, as they long have been offered in association with switched record services. Thus, we must consider whether, in enacting the RCCA subsequent to adoption of the Computer II rules (and presumably, in full awareness of the otherwise applicable unregulated treatment in Computer II of such offerings), Congress intended to establish a special transitional regulatory regime for traditional record services, including even such enhanced service offerings as otherwise might have been deregulated upon implementation of Section 64.702(a) of the Commission's rules. As is discussed below, we conclude that such was Congress' intent.

51. The RCCA itself establishes a largely self-contained regulatory plan for the treatment of record carriers and record communications services. Other carriers and their services are not addressed under this plan, and not even all record services are encompassed thereby. For example, the legislative history specifically requires that high speed data offerings not be in any way affected by the RCCA[23]. But, conversely, services "commonly provided by telegraph companies" including "telegraph, telex and TWX service"[24] were intended to be embraced by the subject matter definition of the RCCA. Section 222(a)(3) states:

> "The term 'record communications service' means those services traditionally offered by telegraph companies, such as telegraph,

[23] Energy and Commerce Committee Report on H.R. 4927 (House Report), H.R. Rept. No. 97–356, 97th Cong. 1st Sess., Dec. 3, 1981, 10.

[24] *Id.*

telegram, telegram exchange, and similar services involving an interconnected network of teletypewriters."[25]

52. We conclude that the enhanced service offerings by record carriers of certain store-and-forward services associated with TWX and Telex, and TWX/Telex conversion (and other service crossover offerings) are within the subject matter scope of the RCCA if they meet a three-part test as to whether they are encompassed by Section 222(a)(3): (1) the services involved in the offering are switched teletypewriter or telegraph services (and not high-speed data services, or voice services, which were intended by Congress to be excluded from the operation of the RCCA); (2) the offering was made prior to enactment of the RCCA[26]; and (3) if a service crossover offering is involved (e.g., conversion between TWX and Telex, or conversion between either of TWX or Telex and another service) *both* services involved in such crossover, and the crossover offering itself, were offered prior to enactment of the RCCA. Under this three-part test, store-and-forward offerings, the input of which is reached by TWX and Telex, would be covered by the RCCA if their outputs are also TWX or Telex. If their outputs are other traditional telegraph services within the scope of Section 222(a)(3), e.g. public telegraph or Mailgram (the latter of which has been considered as public telegraph-like[27], and the crossover itself was offered prior to enactment of the RCCA, such a service crossover use of the store-and-forward facilities involved, notwithstanding the enhanced nature of the offering, is encompassed by the RCCA. If "book" messages have traditionally (i.e., prior to enactment of the RCCA) been reformatted by appending specific address information to the common text for delivery to individual addressees, this offering too would be encompassed by the RCCA, notwithstanding its enhanced nature[28]. Processing for TWX/Telex conversion also would be encompassed by the RCCA.

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[25] *See also* discussion of the goal of achieving "universal access to teletypewriter networks" to increase both the level of competition and the utilization of record services. *Id.* at 5.

[26] The Commission will pay close attention to carrier attempts to frustrate the objectives of the RCCA by repackaging traditional record services that are subject to the RCCA under the guise of a "new service", or by offering new services that are so similar to traditional record services that such new services are required to be treated within the special regulatory scheme of the RCCA.

[27] United Telegraph Workers, AFL-CIO v. FCC, 436 F.2d 920, 923 (D.C. Cir. 1970); Western Union Telegraph Co. v. FCC, 665 F.2d 1126 (D.C. Cir. 1981).

[28] However, one form of the historic treatment of "book" messages would not, in our view, properly meet this test. Western Union has traditionally offered a form of "book" message service whereby the subscriber transmits to it a list of addressees which are then retained in storage by Western Union for association with messages not transmitted contemporaneously with such a list. In some cases, the stored list might be accessed months and even years after its transmission, for association with common text messages transmitted then. We conclude that such a service offering truly involves the offering of "an information storage system",

53. Given this conclusion, that certain otherwise unregulated enhanced services were intended to be encompassed by the special regulatory plan of the RCCA, we now consider how we shall treat interconnection to the facilities which are used to provide these services. We conclude that use of the regulatory tools employed previously to implement the RCCA, including the use of tariff and prescription mechanisms, is at this time warranted. First, the RCCA was enacted subsequent to adoption of Section 64.702(a) of our rules, and may properly be construed as intentionally carving out a limited, narrow and special treatment for the services and carriers addressed therein. In view of this, there is no legal impediment to the use of tariff mechanisms to address interconnection within the scope of the RCCA, notwithstanding the more general principles under Section 64.702(a) of our rules which were established prior to enactment of the RCCA. Second, it is clear that Congress intended that we initially regulate the pricing and other terms of interconnection to record carrier facilities used to provide teletypewriter-based and other traditional record services. Given our previous experience with RCCA interconnection issues, we conclude that tariffs are the most effective tool which might be used, at this time, to carry out Congress' will. Third, there is language in Section 222(c)(2) (which is subject to "sunsetting" in the future) which suggests that Congress intended that the RCCA be implemented initially through the use of tariffs[29]. And finally, inasmuch as the various traditional record services are often substitutable for one another, there is a danger that a failure initially to treat all RCCA interconnection alike, including interconnection to traditional record services which otherwise are enhanced, could lead to frustration of the objectives of the RCCA.

54. It should be emphasized that Congress viewed many aspects of the special regulatory requirements of the RCCA, as transitional and subject to automatic "sunsetting" in less than two years, Section 222(e)(1). Thus, our decision to subject to continued tariff regulation under the RCCA store-and-forward and service conversion offerings which meet the three-part test of paragraph 52 above will only have effect for the remaining two years of vitality of the entire RCCA. Thereafter such offerings would be controlled by our overall Computer II policies and by those portions of the RCCA which are not subject to "sunsetting," including our specific authority to phase down and forebear from regulation as competition develops[30].

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77 FCC2d at 420, and that it is not sufficiently related to the record carrier communications "services" encompassed by the RCCA to be treated as an exception to Computer II. The distinction is whether the multiple addresses are transmitted contemporaneously with the common text, or not.

[29] See also, House Report, supra. n. 23, 11.

[30] Therefore, traditional store-and-forward offerings which meet the three-part test of para. 52 will be required to be offered on a tariffed basis. Although the RCCA

55. The three-part test of paragraph 52 is intended to ensure that new offerings which may arise during the period of full effectiveness of the RCCA are not unnecessarily subjected to comprehensive regulation. We are willing to interpret the RCCA as specially carving out a limited exception to Computer II for "traditional" record services; we are not willing to extend this exception to non-traditional offerings of otherwise enhanced services, particularly in view of the recognition by Congress that not all services provided by record carriers are to be treated specially under the RCCA (*e.g.*, the exclusion of high-speed data services, as discussed previously).

56. In sum, we conclude that the RCCA establishes a limited exception (for no more than two years) from the otherwise applicable ineligibility for tariffing of enhanced services in Section 64.702(a) of our rules, for certain store-and-forward offerings and service conversion offerings by record carriers, and that such offerings must be regulated using tariff regulation procedures during the period specified in Section 222(e)(1). In this proceeding, we are considering carrier-to-carrier interconnection issues related to interconnection with the facilities which implement these offerings. We conclude that we are free to utilize the tariff regulation mechanisms previously employed in the *Interim Decision* and in the *Rejection Order* for other forms of RCCA-mandated interconnection to achieve the purposes of the RCCA, that such an approach is required to carry out the intent of Congress, and that such an approach comports with the public interest.

B. Prescription of Store-and-Forward Interconnection

57. As noted, during the July 13–14, 1982 meetings the carriers generally agreed to the concept that three options for interconnection to store-and-forward facilities, at the option of the carrier operating these facilities, should be available: two options under which the interconnecting subscriber's carrier would be compensated on the basis of input minutes (treated as domestic minutes, regardless of whether the output messages are domestic or international), and one option under which the interconnecting subscriber's carrier would be compensated on the basis of output minutes (under principles otherwise applied to real time calling, including factoring of international outputs, and discounting of compensation for all

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generally requires relatively comprehensive regulation of carrier-to-carrier interconnection, because the costs of interconnection compensation are generally contained in carriers' subscriber tariffs, and because of the requirement that carriers pass along to subscribers the benefits of interconnection savings, subscriber tariffs also have been affected by the RCCA. We therefore are ordering that tariffs for store-and-forward services and service conversion offerings within the boundaries established by para. 52 will be maintained, notwithstanding the provisions of Section 64.702(a) of the Commission's rules.

outputs). Where the carriers parted company was over whether a carrier-to-carrier interconnection discount should apply to one of the first group of input-based compensation options (a subscriber-paid-collect option). Several of the traditional record carriers argue that since an end-on-end service offering is contemplated alike by both of the input-based options (i.e., subscriber-paid, and subscriber-paid-collect), a discount should not be applied to either. The more recent entrants, CCI and IRI, argue that the subscriber-paid-collect case is no different than any other form of carrier-to-carrier interconnection under which the second carrier (i.e., the carrier operating the store-and-forward facilities here) is billing the subscriber for the through call and compensating the first interconnecting carrier. Thus, they argue for a discount.

58. In the *Tentative Decision*, paras. 18–22, we discussed at length our tentative view that output-based compensation is inconsistent both with the terms of the RCCA, and the Communications Act generally. It can lead to overcompensation of an interconnecting carrier in the case of "book" messages, and it does not properly reflect the economies (or costs) associated with use of store-and-forward facilities in lieu of real-time facilities for message completion. We still believe that the analysis in the *Tentative Decision* was correct, and that the compensation principles discussed therein are appropriate.

59. However, in interpreting the RCCA we have applied a "rule of reason" to minimize excessive disruption of carriers' existing operations. While the RCCA requires interconnection which is "equal in type and quality", we previously have utilized the normal Communications Act standard of reasonableness in interpreting this requirement. Here, similar analysis has some bearing upon the result. TRT argues that it cannot implement input-based compensation without extensive facilities modifications; other carriers argue that they can, but only by sacrificing departmental billing capabilities which they are now providing and their subscribers desire.

60. In these circumstances, we are prepared to permit the output-based compensation option to be made available[31]. But, if we do so other problems are created. The *Tentative Decision* proposed two input-based compensation options and, to reach the result that subscribers would be indifferent to which of these options might be

[31] We believe that this result will be transitional. The newer entrants, CCI and IRI, primarily offer store-and-forward international message services. These carriers have made it clear that they will opt for input-based compensation approaches, and under universal interconnection subscribers will be able to access their offerings with relative ease. To the extent that such approaches are more efficient and will result in lower subscriber rates than those of competitors opting for output-based compensation, the new entrants will make competitive inroads. At some point, their more traditional competitors will have incentives to change their facilities to implement the input-based compensation approaches.

chosen by a carrier, it proposed further that compensation to the interconnecting subscriber's carrier be the *same* under either such approach (by proposing that a carrier-to-carrier discount not be applied in one of these approaches). If the new output-based compensation option is made available, compensation will be different under such an approach than under *either* of the input-based compensation approaches previously proposed, regardless of whether a discount is applied to one of the latter approaches or not. Thus, the thrust of the proposal in the *Tentative Decision* that a subscriber be indifferent to which compensation approach might be chosen by the store-and-forward carrier is lost. In these circumstances, there is no basis for not applying a carrier-to-carrier discount to input-based compensation approaches, just as the carriers have proposed to do with respect to the output-based approach which they have requested us to sanction.

61. One of the input-based approaches is a subscriber-paid access approach where a store-and-forward call is literally treated as two separate calls. The subscriber places a domestic call on the interconnecting carrier's network, and that network completes the call to a store-and-forward carrier's facilities the same as it might complete any other domestic call, and it provides timing and billing to the subscriber for the call just as it would for any other domestic call. For such calling, no discount is justified as the store-and-forward carrier is assuming no functions or costs otherwise assumed by the interconnecting carrier.

62. But, the other input-based approach advanced at the July meetings, the subscriber-paid-collect approach, appears to represent end-on-end service in name only. The subscriber does not receive a bill from the interconnecting carrier for a call towards another carrier's store-and-forward facilities; it receives one bill from the store-and-forward carrier for a through call. The store-and-forward carrier in fact is providing compensation to the interconnecting carrier, albeit in lieu of the subscriber, under the proposed "collect" billing arrangements. This is no different than other forms of carrier-to-carrier interconnection where the second carrier is deemed the "originating carrier", except in name. Indeed, it is unclear which carrier would actually perform the timing of such calls. The new entrants argue that the actual physical interconnection arrangements to implement this interconnection would be identical to those employed for carrier-paid real-time interconnection, which suggests that the store-and-forward carrier would provide timing as well as billing in lieu of the interconnecting subscriber's carrier.

63. We conclude that there is much force to the arguments of CCI and IRI that the so-called subscriber-paid-collect option should be deemed a carrier-paid interconnection option to which discounting is applicable. The basis in the *Tentative Decision* for not applying

such discounting is no longer present if the output-based compensation option is made available, and the actual interconnection arrangements appear no different than those for other carrier-paid access interconnection to which discounting is applied. Furthermore, no distinction should be made between international and domestic messages transmitted over such arrangements. The conversion factor (currently 1.3) is not intended to create different compensation for international and domestic messages; it is intended to convert measured international minutes to minutes which represent actual use of the interconnecting carrier's domestic facilties, in circumstances where the actual domestic minutes are not ordinarily measured and captured. Here, such a proxy for the minutes of use of the interconnecting carrier's facilities is unnecessary; the actual minutes are measured when input-based compensation is used.

64. Thus, we shall treat this form of carrier-to-carrier interconnection no differently than other forms of such interconnection are treated, including application of a carrier-to-carrier discount (currently 15%). We recognize that under such circumstances, a given carrier might be placed in the position of interconnecting with another carrier's store-and-forward services on a different basis than it provides domestic service toward its own store-and-forward services. (For example, based on the comments, it is likely that TRT would select an output-based billing arrangement for its own store-and-forward subscribers, while CCI or IRI would select an input-based arrangement for calling by TRT's subscribers toward their store-and-forward facilities.) However, under a "rule of reason" approach, such inequality would be permissible under the RCCA, and we need not resort to a legal fiction of deeming the input-based compensation arrangement a species of subscriber-paid access to avoid this issue. In essence, the proper compensation approach in our view is the input-based one. We are willing to permit carriers to opt for a less desirable output-based one for their own store-and-forward services to avoid major facilities changes. But, we will not permit such carriers—which retain the option of employing the more desirable approach—to use this choice as a basis for denying other carriers the more desirable compensation approach, or for denying them discounts.

65. Furthermore, upon review of the merits of allowing for two forms of "carrier-paid" access and a third "subscriber-paid" access option (as originally was proposed in the *Tentative Decision* and as was retained in the carriers' consensus language), we conclude that the "subscriber-paid" access option need not, and should not, be available. While we are prepared, under a "rule of reason" principle, to allow a given carrier's domestic facilities to be connected with the store-and-forward facilities of another carrier on a different basis than to its own store-and-forward facilities—at the option of the store-and-forward carrier and presumably without prejudice there-

to—we are unwilling to allow for any more inequality than is absolutely necessary. The RCCA requires interconnection by a carrier with others which is "equal in quality in type" to that used by the carrier in its own operations. Unnecessarily diverse interconnection options would be difficult for carriers and for the Commission to monitor, and may give rise to disputes, particularly if the availability of such options might be manipulated effectively to deny carriers the benefits of the interconnection requirements of the RCCA.

66. In view of the foregoing, we hereby prescribe the following options for carrier-to-carrier interconnection to store-and-forward facilities, at the option of each store-and-forward carrier:

A. The store-and-forward carrier shall compensate the carrier on whose network the call is initiated on the basis of the billable minutes of output from the store-and-forward facility occasioned by the customer's input. The basis of compensation will be the initiating carrier's domestic intra-network rate as discounted by Commission prescription (currently 15%), provided that in the case of international output, the output minutes shall be multiplied by the conversion factor for international-to-domestic billable minutes then in effect between the initiating carrier and the store-and-forward carrier The initiating carrier shall make no charge to its subscriber for such calls, and the store-and-forward carrier shall bill the subscriber for the through call.[32]

B. The store-and-forward carrier shall compensate the carrier on whose network the call is initiated on the basis of the measured minutes of input to the store-and-forward carrier's facilities occasioned by the customer's input. The basis of compensation will be the initiating carrier's domestic intra-network rate as discounted by Commission prescription (currently 15%). The initiating carrier shall make no charge to its subscriber for such calls, and the store-and-forward carrier shall bill the subscriber for the through call.[33]

67. Finally, we must address the desire of certain carriers to be able to select "one or more" options simultaneously. As was acknowledged in TRT's response to the Bureau Chief's July 21, 1982 letter, simultaneous selection by a store-and-forward carrier of multiple options would raise serious questions under Section 202(a)

[32] This language was drafted by the carriers at the July 14, 1982 meeting.

[33] This language, which is patterned after the carriers' option A language above, is ours, and it implements an input-based compensation approach subject to carrier-to-carrier interconnection discounting. The controversial language drafted by the carriers at the July 14, 1982 meeting to implement their subscriber-paid-collect proposal was: "The subscriber of the initiating carrier shall pay the store-and-forward carrier for the entire service. Carrier-to-carrier billing shall be done based on actual domestic connect time times the tariffed domestic intra-network rate. The initiating carrier shall make no charge to its subscriber for such calls."

of the Act. Under either of the options, the same store-and-forward message service would be made available to subscribers through interconnection, but the charges therefor would be different, which certainly raises the spectre that like service at unlike charges (in violation of Section 202(a)) would be involved. Under options A and B above, the store-and-forward carrier providing a bill for through service to the subscriber in interconnected service must pass through to the subscriber the access compensation provided the interconnecting carrier unchanged in the case of an international message. Since the compensation would differ depending upon which of these options might be utilized, it is obvious that different subscriber charges would be involved. And, since the services provided over either option, as perceived by the subscriber, would be identical (except with respect to price), they would be "like."

68. TRT argues that it is sufficient that we place the carriers on notice of these potential problems, and that we face this issue only if a given carrier seeks to utilize multiple options. However, CCI argues that it is free to utilize multiple options now (and that it expects to do so). We hereby conclude that in the clear cases of interconnection for international calling under options A and B, both may not be selected simultaneously; because of the pass along requirement, such simultaneous selection of these options will create offerings of like service at different charges in violation of Section 202(a).

69. In sum, we have prescribed the principles under which carrier-to-carrier interconnection to store-and-forward facilities will proceed, at the option of each carrier operating store-and-forward facilities. We conclude that interconnection to store-and-forward facilities which meet the three-part test established in para. 52 above is required by the RCCA, and that such interconnection is required in the public interest. Accordingly, we order each carrier operating store-and-forward facilities to offer access thereto through interconnection with the facilities of other record carriers, by filing revisions in its tariffs as follows. Each carrier operating store-and-forward facilities must file revisions in its public *international* tariff including: a description of the offering of store-and-forward access through interconnection; an appropriate access code for use by other record carriers and their subscribers; an indication that subscribers will be billed by the store-and-forward carrier for the total end-to-end charge; a domestic component which is unbundled from an international component (the latter of which may include a store-and-forward component); a statement indicating that the domestic component of another record carrier will be applied in lieu of the store-and-forward carrier's domestic charge if the customer is calling from another domestic network, and a reference to the interconnection tariffs of other carriers to facilitate the determination by subscribers of applicable charges; and a single chosen basis for computation of domestic minutes or equivalents thereto in the case

of telegram or similar service (that is, input minutes or factored output minutes). Each carrier operating store-and-forward facilities must file revisions in its public *domestic* tariff including: a description of the offering of store-and-forward access through interconnection; an appropriate access code for use by other record carriers and their subscribers; an indication that subscribers will be billed by the store-and-forward carrier for the total end-to-end charge; and a single chosen basis for computation of message timing or equivalents thereto in the case of telegram or similar service (that is, input minutes or output minutes). The store-and-forward carrier may make a single choice between input-based compensation and output-based compensation, which will apply equally to international and to domestic service.

70. Furthermore, interconnecting record carriers are ordered to revise their interconnection tariffs to reflect compensation for use of their facilities, in interconnected service to store-and-forward carriers' facilities, under both compensation options made available in this decision, as specified in each store-and-forward carrier's public tariffs (as is required in the previous paragraph). Specifically, an output-based compensation option and an input-based compensation option must be specified, as outlined in paragraph 66 above. Since both of these options are "carrier-paid" interconnection options, interconnecting carriers are ordered to ensure that subscriber billing is suppressed during interconnected calling by their subscribers to another carrier's store-and-forward facilities. Moreover, store-and-forward carriers are ordered to maintain accurate and verifiable records of compensation due interconnecting carriers, and to settle with such carriers expeditiously[34].

C. 110 Baud ASCII Access to TWX

71. In the *Tentative Decision* we proposed that "without restraint" domestic interconnection to TWX (using the TWX code and protocol, in addition to the current telex code and protocol access to TWX) be made available, without prejudice to consideration in the future of whether, and to what extent, "with restraint" TWX interconnection also should be made available. The comments support this proposal, although several advert to the possibility that the "with restraint" issue will be required to be faced in the future. Accordingly, we prescribe that domestic interconnection to TWX be made available using the TWX code and protocol but "without

[34] A final matter was resolved by the carriers in their comments. To implement any interconnection to store-and-forward facilties, it is assumed that the store-and-forward carrier will bill the originating subscriber for message outputs, and for access as well. Carriers operating store-and-forward facilities require access to interconnecting carriers' "answerback" data, to identify the subscribers to whom bills may be sent. It was proposed in the Tentative Decision that such information be exchanged among the record carriers without charge. This concept was agreed to by the carriers, and is hereby prescribed.

restraint", in addition to telex-like domestic interconnection to TWX using the telex code and protocol, as proposed in the *Tentative Decision.*

V. *Ordering Clauses*

72. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 203, 205, 222 and 416(c) of the Communications Act of 1934 as amended, That Western Union Telegraph Company, RCA Global Communications, Inc., Western Union International, Inc., FTC Communications, Inc, TRT Telecommunications Corp., and ITT World Communications Inc., SHALL COMPLY WITH THIS ORDER AND FILE TARIFF REVISIONS CONSISTENT THEREWITH no later than twenty days from release of this order, to be effective on no more than ninety days notice.

73. IT IS FURTHER ORDERED, That, the foregoing carriers SHALL NOT DETARIFF any store-and-forward or service conversion offering which meets the three-part test of para. 52 of this order, and which therefore is within the subject matter of the Record Carrier Competition Act of 1981, notwithstanding the provisions of Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a), which otherwise might be applicable.

74. IT IS FURTHER ORDERED, That Sections 61.58, 61.59 and 61.74 of the Commission's Rules ARE HEREBY WAIVED TO THE EXTENT NECESSARY to permit the filing of tariff revisions implementing the prescriptive provisions and specific prescribed language as set forth in this order.

75. IT IS FURTHER ORDERED, That the filing of data required by Section 61.38 of the Commission's Rules for the filings necessary to implement this order IS HEREBY DEFERRED until such time as may be required by the Chief, Common Carrier Bureau.

76. IT IS FURTHER ORDERED, That the public interest as expressed in the Record Carrier Competition Act of 1981 and the Communications Act requires that THIS ORDER BE EFFECTIVE IMMEDIATELY upon actual notice to the affected carriers.

77. IT IS FURTHER ORDERED, That this order be printed in the Federal Register.[35]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[35] Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), IT IS CERTIFIED, That Sections 603 and 604 of that Act do not apply because this prescription will not have a significant economic impact on a substantial number of small entities. The primary economic impact of this order will be upon carriers, not users.

Application, for Review
CATV Carriage, Significant Viewing Test

Request for review of decision of Bureau Chief denying request to utilize county-wide data to establish significantly viewed status denied. No reasons proffered to warrant change in established policy.
–KOIN-TV, Inc.

FCC 83–87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

KOIN-TV, INC. Portland, Oregon

CSR-1860

KING BROADCASTING COMPANY
Portland, Oregon

CSR-1873

Application for Review

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983 Released: March 15, 1983)

BY THE COMMISSION:

1. On December 4, 1981, King Broadcasting Company (hereinafter "KGW-TV"), licensee of Station KGW-TV (NBC, Channel 8), Portland, Oregon, pursuant to Section 1.115 of the Commission's Rules, filed an "Application for Review" of the action taken by the Chief of the Cable Television Bureau pursuant to delegated authority in *KOIN-TV, Inc.* (Portland, Oregon), Mimeo No. 299, 50 RR 2d 715 (1981). KGW-TV's application is opposed by Ponderosa Television, Inc. (hereinafter "KTVZ"), licensee of Station KTVZ (NBC/CBS, Channel 21), Bend, Oregon.[1]

2. On January 23, 1981, KGW-TV filed a petition (CSR-1873) seeking waiver of Sections 76.54(b) and (c) of the Commission's Rules, to allow KGW-TV to establish itself as significantly viewed in Deschutes County, Oregon, utilizing county-wide data. Absent waiv-

[1] On January 4, 1982, KGW-TV filed a "Reply to Opposition to Application for Review." This pleading was not requested by the Commission and will be dismissed pursuant to Section 1.115(f) of the Rules.

er, KGW-TV would have to provide community-specific data for each cable television community in Deschutes County.[2] KGW-TV also sought to consolidate its request with an identical request (CSR-1860) filed by KOIN-TV, Inc. (hereinafter "KOIN-TV"), licensee of Station KOIN-TV (CBS, Channel 6), Portland, Oregon. Both KGW-TV and KOIN-TV argued that county-wide Arbitron data demonstrate that the two stations have been significantly viewed in Deschutes County since 1970, and that such data is sufficient to establish significantly viewed status. In *KOIN-TV, Inc., supra*, the stations' petitions were denied. The Bureau Chief noted that while county-wide data was used to establish the Commission's list of significantly viewed signals,[3] community-specific data was not then available, as it is today. In addition, the Bureau Chief noted that it is Commission policy that an application for an addition to the list be supported by a showing that the required viewing level is attained in the community in question. "[P]etitioners have failed to demonstrate that the necessary surveys are too expensive [or] too burdensome. . . . Furthermore, no financial data whatsoever has been submitted, either with regard to the cost of such surveys or to the ability of petitioners to finance such surveys." *id.* at 719.

3. In support of its "Application for Review," KGW-TV summarizes and reiterates the arguments it submitted in its original petition. In addition, KGW-TV contends that the Commission policy which resulted in the denial of KGW-TV's petition should no longer be followed. KGW-TV asserts that while the Commission's insistence upon community-specific data may have been valid in 1972 in order to proceed cautiously with regard to modifications of the then newly adopted cable television rules, such caution should not overcome a decade of equally reliable Arbitron viewing survey results. KGW-TV contends that denial of its requested relief would defeat the purpose of Section 76.54 of the Rules, which KGW-TV states is ". . . to provide a reliable mechanism for amending the table of significantly viewed signals. . . ." KGW-TV claims that the Arbitron surveys comport with the procedural requirements of the rule, and argues that the Commission has previously awarded significantly viewed status based on such data. In addition, KGW-TV notes that similar surveys have been used by the Commission in impact analyses in various cases, and also that "these surveys and others like them are the basic viewing measures used by the industry itself."

4. In its "Opposition to Application for Review," filed December 21, 1981, KTVZ argues that KGW-TV actually challenges Section

[2] The systems in the county are: Bend Community Antenna Co. (Bend); Key TV Inc. (Redmond); Sisters Cable Co. (Sisters); and Sun Tronics Television System (Sunriver).

[3] *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 378–463 app. B (1972).

76.54(b) of the Rules itself, and that KGW-TV's application is really a petition for rulemaking. KTVZ contends that the Commission's policy in this field remains valid, especially in light of recent regulatory developments. Now that the Commission has lifted its restrictions on the importation of distant signals,[4] and also exempted significantly viewed signals from being blacked out pursuant to the network program nonduplication rules,[5] argues KTVZ, the importance of significantly viewed status in the context of nonduplication protection has been increased. Accordingly, contends KTVZ, a ". . . concern for the viability of local program outlets underscores and reinforces the continuing applicability and relevance of Section 76.54(b)," especially its requirement that surveys and data be community-specific.[6] KTVZ also reiterates its argument that KGW-TV should not enjoy significantly viewed status in Deschutes County because it is not received directly off-air in the county but rather it is retransmitted by translator.

5. The significant viewing rules—Sections 76.5(k) and 76.54 of the Rules—were adopted in 1972 in what was clearly a compromise weighing various considerations. It was recognized that county-wide data might inadequately reflect viewing levels in all parts of a county, but it was also recognized that it would be desirable to provide some degree of certainty as to which signals met the test at the outset and thus avoid the delays and uncertainties associated with individual community surveys. The result was a decision, articulated in the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143 (1972), and in the *Reconsideration of the Cable Television Report and Order*, *supra*, and reflected in the differences between Sections 76.54(a) and 76.54(b) of the Rules, to make use of county-wide data as it existed in 1972, but thereafter to require both broadcasters and cable television system operators to demonstrate the required audience viewing levels for stations already on the air in 1972 on a community-by-community basis. Community-by-community surveys, moreover, were only permitted after notice to other interested parties so that, to the extent possible, survey methodologies could be agreed on. Separate rules addressed the carriage and

[4] *Report and Order in Docket Nos. 20988 and 21284*, FCC 80–443, 79 FCC 2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York, Inc. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom. National Association of Broadcasters v. FCC*, 102 S.Ct. 1002 (1982).

[5] *Memorandum Opinion and Order in Docket No. 19995*, FCC 78–217, 67 FCC 2d 1303 (1978), *granting recon. of* 76–1076, 62 FCC 2d 99 (1976), *recon. denied*, FCC 78–597, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. Federal Communications Commission*, 619 F.2d 314 (4th Cir. 1980).

[6] KTVZ has also objected to a "Notice of Intent to Conduct Significant Viewing Survey" submitted on behalf of KGW-TV, KOIN-TV, and Television Broadcast Station KATU (ABC, Channel 2), Portland, Oregon, contending that the survey's methodology will not distinguish between direct off-air viewing of the Portland stations and viewing of these stations from translators. No information from such a survey, if it has been conducted, has been submitted.

deletion of the signals of translator stations. Translators with 100 watts or higher power were to be carried if they were "serving the community" of the cable systems[7] and were entitled not to be deleted under the network nonduplication rules if "licensed to the community" of the cable system.[8]

6. In this proceeding it seems relatively clear that the two Portland television stations seeking relief under the rules are widely viewed in the county in which Bend is located and have been for some years. This audience, it appears, is almost entirely from translator stations, which are not licensed to Bend.[9] Neither of the stations meet the 1972 significant viewing test as set forth in Section 76.54(a) of the rules, and no audience data for Bend or any other community has been submitted which might permit a judgment to be made as to whether that part of the rule has been complied with. Rather, what has been submitted is county-wide data which evidently includes that audience of the translator stations located in the county, along with a request that the procedural requirements of the rules otherwise be waived.

7. We do not find any reason to reconsider those requirements in the context of this proceeding. The parties in this proceeding acknowledge that their viewing data includes translator viewing data. In analyzing viewing data submitted pursuant to Section 76.54 of the Rules, translator viewing statistics are not normally to be combined with the audience viewing statistics of the originating station. *Scranton Broadcasters, Inc. and WBRE-TV, Inc.*, FCC 82–58, 88 FCC 2d 1482 (1982). Pursuant to Sections 76.5(k), (l), (m), and (n) of the Rules, significantly viewed status is available only to commercial television broadcast stations, and not to television translator stations. Even were we to accept the data submitted in this proceeding, since KGW-TV has chosen not to separate out audience statistics for its translator station nor for KOIN-TV's translator station, we have no evidence in this proceeding upon which a finding of significantly viewed status for either station could be made. *Scranton Broadcasters, Inc. and WBRE-TV, Inc., supra.*

8. The remaining question before us is whether reasons have been presented which would justify waiver of our requirement that the significantly viewed status of a station on the air in 1972, but not on our significantly viewed list, be determined by reference to community-specific data. We cannot conclude that such reasons have been advanced. While we have in the past accepted county-wide

[7] *See, e.g.*, Section 76.59 of the Rules.

[8] *See, e.g.*, Section 76.92(e) of the Rules.

[9] KGW-TV's translator, K75BL, and KOIN-TV's translator, K70AI, are licensed to serve Prineville and Redmond, Oregon.

showings from stations which had been on the air at the time of the original surveys,[10] this was only upon a showing of major financial burden or extensive technical improvements to the station.[11] KGW-TV has not submitted any such information. As the Bureau Chief noted in *KOIN-TV, Inc.*, 50 RR 2d at 718, we stated in 1972 that "we see no reason not . . . to require that the required viewing level is attained in the cable community in question where the showing is in support of a specific application." *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 348–349.

9. In view of the foregoing, we find that grant of KGW-TV's application is not in the public interest.

10. Accordingly, IT IS ORDERED, That the "Reply to Opposition to Application for Review" filed January 4, 1982, by King Broadcasting Company IS DISMISSED.

11. IT IS FURTHER ORDERED, That the "Application for Review" filed December 4, 1981, by King Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[10] Section 76.54(d) of the Rules allows post-survey stations to utilize county-wide data, to ensure equitable treatment for such stations. *Report and Order in Docket No. 20371*, FCC 75–1145, 56 FCC 2d 265 (1975).

[11] *Clearview Cable TV* (Richmond, Indiana), FCC 79–199, 71 FCC 2d 1133 (1979); *Calvert Telecommunications Corp. d/b/a CALTEC* (Lutherville-Timonium, Maryland), FCC 77–180, 63 FCC 2d 1022 (1977); *Courier Cable Company, Inc.* (Buffalo, New York), FCC 77–75, 63 FCC 2d 79 (1977); *Burwell Cable TV, Inc. d/b/a Imperial Cable TV* (Imperial, Nebraska), FCC 76–767, 60 FCC 2d 759 (1976); *Cablevision of Marlow, Inc.* (Marlow, Oklahoma) FCC 73–1273, 44 FCC 2d 257 (1973).

Minority Ownership, Factor in Comparative Proceeding
Ownership and Management, Integration of
Review by Review Board

Review Board affirms Initial Decision granting construction permit to applicant with greatest quantitative integration of ownership and management.
–*Las Misiones De Bejar TV Co.*
BC Docket No. 81–647

FCC 83R-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAS MISIONES DE BEJAR TELEVISION CO. San Antonio, Texas	BC Docket No. 81–647 File No. BPCT-5235
ALAMO BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–648 File No. BPCT-5244
CHRISTIAN TELE-COMMUNICATIONS, INC. San Antonio, Texas	BC Docket No. 81–649 File No. BPCT-5245
UNITED TELEVISION BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–652 File No. BPCT-5248
For Construction Permit	

APPEARANCES

William K. Keane, for Las Misiones De Bejar Television Company; *Meredith Senter*, for Alamo Broadcasting Corporation; *George R. Grange, II*, for Christian Tele-Communications, Inc.; and *Stephen T. Yelverton*, for Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: February 4, 1983; Released: February 11, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Three applicants are continuing their contest for a UHF television channel in San Antonio, Texas; the fourth applicant which participated in the comparative hearing has not filed exceptions to the Initial Decision of Administrative Law Judge Stirmer, FCC 82D-55, released August 4, 1982. Las Misiones De Bejar and Christian Tele-Communications, Inc., the losing applicants, filed briefs and exceptions on September 3; reply briefs were filed on September 23; and oral argument was held November 24, 1982. Our review of the record and the parties' contentions has been facilitated by a solid Initial Decision which contains the necessary findings and conclusions. This has permitted the Board to focus upon the questions presented by the parties, and after considering the written and oral arguments, we affirm the ALJ's selection of Alamo Broadcasting Corporation because of its substantial integration preference, para. 17 below. In essence, the ALJ correctly applied the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) and then available precedents such as *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); and *WPIX, Inc.*, 68 FCC 2d 381, 411 (1978). His conclusion is also supported by other recent decisions. *Waters Broadcasting Corp.*, FCC 82–483, released December 1, 1982; and *Absolutely Great Radio, Inc.*, FCC 83R-9, released February 4, 1983.

2. *Background*: The basic findings of fact in the Initial Decision, see I.D. paras. 1–92, 104–105, are supported by the record and are hereby adopted. These findings led the Administrative Law Judge to conclude that Alamo was the best comparative applicant. *I.D.*, para. 155, 148–154. When new broadcast applicants are being compared we first look at diversification of control of ownership of mass media of communications which constitutes "a primary objective in the licensing scheme," 1965 *Policy Statement*, *supra*, 1 FCC 2d at 394. No other cognizable or significant media interests were attributable to Alamo, the ALJ correctly concluded, because of its timely and unequivocal commitment to divest other media interests before the receipt of program test authority for its proposed San Antonio station. *I.D.*, paras. 130–132. Since the other applicants also did not have any cognizable media interests, *I.D.*, para. 155, the comparative choice turned on which applicant was entitled to a preference for full-time participation of owners in the management of the the station. 1965 *Policy Statement*, 1 FCC 2d at 395.

3. This comparative factor emphasizes the "substantial importance" which the Commission attaches to new applicants which propose the largest quantity of ownership participation in managing the "day-to-day operation of the station." Highest credit is given for full-time "integration of stockholders exercising policy functions."

The focus is upon the positions which the participating owners will occupy "to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Policy Statement, supra,* 1 FCC 2d at 395. Quantitative credit may be enhanced by qualitative factors. This aspect of comparison deals with attributes of the owners, 1 FCC 2d at 395–396. Of special relevance are local residence and minority ownership. *Waters, supra,* FCC 82–483, para. 11. Female ownership and broadcast experience are also considered enhancement factors but are entitled to lesser weight. *Policy Statement, supra,* 1 FCC 2d at 396; *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829 (Rev. Bd. 1979), *rev. denied*, FCC 80–734, Dec. 4, 1980.

4. After all the relevant factors had been weighed, and findings had been made, the ALJ held that Alamo was entitled to a "substantial preference" over the other applicants on the integration factor. *I.D.*, para. 155. Alamo proposed that 99% of its stock be integrated full time in the operation of the station. Paris Schindler, with 45% of the stock, is the proposed general manager, and will relocate to San Antonio; his sister Sherry Schindler, 30%, is the proposed program manager, and will also relocate; Phyllis Davis, 15%, a long-time resident, is the proposed women's news director. (*I.D.*, paras. 148–151, 22–38). Four local resident minority owners with 9% of the stock also proposed to participate full time in the management of the station. Mr. Lopez, a Hispanic with 2% of the stock, is the proposed business manager; Mr. Myart, 3%, a Black American, is promotion manager; Ms. Long, 2%, a Black American, is community and cultural affairs director; and Mr. Collins, 2%, a Black American, is the proposed news director. (*I.D.*, paras. 152–153; 39–74)

5. In his ultimate conclusions the ALJ decided that it was not necessary to award any credit to Alamo for the four minority stockholders, whose participation had been challenged by the competitors as "tokenism" and "window dressing." *I.D.*, paras. 152–154. Alamo's credit for at least 90% ownership participation, the ALJ reasoned, was more than enough to substantially outweigh the proposals of its competitors. Thus, Las Misiones was awarded credit for 12.5% full-time participation of Dr. San Martin, its proposed general manager. This credit was enhanced because Dr. San Martin is a Hispanic and "long time local resident of San Antonio with an exemplary record of civic participation in leadership capacities. . . ." *I.D.*, paras. 155, 136. Las Misiones' enhanced credit was found to be sufficient to overcome Christian Tele-Communications' credit for 16.6% full-time participation, but neither proposal was sufficient to overcome Alamo's proposal of at least 90% participation.

6. Three major points emerge from a review of the briefs. First, Las Misiones argues that it should have been awarded a decisive and "substantial preference for its minority ownership *per se*" Br. 17–27.

Second, Tele-Communications urges that it should have been awarded 100% credit for integration even though one of its three directors withdrew from the broadcast venture, after the hearing, because of a religious dispute. (Br. 22–30). It also argues that the ALJ erred in finding its corporation to be a mere broadcasting subsidiary of the Trinity Church and thereby reducing its integration credit to 16.6% (Br. 5–21). Finally, the winning applicant Alamo submits that it should have also been credited for the additional 9% minority ownership. (Reply Br. 16–20).

7. *Las Misiones "Per Se" Rule.* At the hearing and in its exceptions Las Misiones urged a grant on a novel theory in comparative cases. It pointed to its 100% ownership by local residents who are also Hispanic Americans and to the fact that more than 50% of San Antonio's population is Hispanic. Decisive significance should be given to minority ownership *per se* even though most of that ownership (87.5%) would not participate full time in the management of the station. *I.D.*, paras. 137–138. The ALJ correctly ruled that Las Misiones was urging the adoption of a new policy at variance with the policy set out by the Commission in *WPIX*, *supra*, 68 FCC 2d at 411–412, and *Klein*, *supra*, 86 FCC 2d at 430–32. Those cases established that minority ownership is related to integration of ownership into management. It is an attribute of ownership, like local residence, which enhances the qualitative aspects of integration. Both local residence and minority ownership help contribute to diversification of ownership. Those cases had been consistently applied by the Review Board, the ALJ noted. Thus, special credit was not awarded for minority ownership in proportion to ethnic composition of the community in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 845 n. 17, 50 RR 2d 1117 (Rev. Bd. 1981), because "the relevant consideration is not minority ownership *per se*, but rather the extent to which minority owners are integrated into the proposed . . . operation." 88 FCC 2d at 844. See also *Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982); *Radio Gaithersburg, Inc.*, *supra*, 72 FCC 2d 820. Accordingly, the ALJ, applying existing policy, concluded that a large quantitative difference in full-time integration could not be overcome by qualitative differences. *I.D.*, paras. 137–139.

8. A *per se* minority rule is inconsistent with the established policy on which the ALJ relied and a very recent decision where a Black applicant with 100% full-time integration was awarded substantial enhancement credit for minority ownership even though there was no significant minority presence in the community, *Waters Broadcasting Corp.*, 88 FCC 2d 1204 (Rev. Bd. 1981), *rev'd on other grounds*, FCC 82–483. *supra*. In that case the Board followed the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 980–981 (1978), which indicated that the absence of minority ownership was "detrimental not only to

the minority audience but to *all of the viewing and listening public.* Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community *but also enriches and educates the non-minority* audience'. (Emphasis added.) Later in the *Minority Policy Statement*, the Commission cited with approval several cases in which comparative merit was awarded to applicants whose '*minority owners were to participate in the operation of the station*'. 68 FCC 2d at 982, and note 15." (Emphasis added.) *Id.*, 88 FCC 2d at 1210.

9. On appeal the Commission specifically reaffirmed this past approach in *Waters*, FCC 82–483, at paras. 8–9. In its conclusion, it did stress that the "minority ownership policy is to be given full application and significant weight in comparative . . . proceedings." Waters was awarded "substantial enhancement" credit because its "100% minority and female ownership [was] integrated with full-time management." FCC 82–483 at paras. 11–12. In *Waters* and *Klein*, 100% and 5% full-time minority participation tipped the comparative scales in favor of the winning applicants; but the Commission did not apply a *per se* rule; nor did it award credit in proportion to minority population in the community proposed to be served. In both cases minority ownership, like other attributes of owners, was considered a factor enhancing full-time participation of owners in the management of the station.

10. In *Absolutely Great Radio, Inc., supra*, FCC 83R-9, a minority applicant proposing 100% full-time participation was victorious. Following the Commission's decisions in *WPIX*, and *Waters*, the Board rejected a suggestion that "minority ownership is an independent factor and not subsumed within the integration criterion," at para. 16, n. 17. That holding is equally applicable here and we therefore affirm the ALJ's rejection of the proposed *per se* rule. Las Misiones points to the lottery legislation and the Commission's rulemaking in the low power television and clear channel proceedings as special demonstrations of Congressional and Commission sensitivity to the need for minority ownership. While these actions did relate to minority ownership they did not deal with or change existing comparative standards and policy. Under these circumstances neither the ALJ nor the Board is authorized to make the substantial changes in comparative policy and standards contemplated by the proposed *per se* rule. See *Horne Industries, Inc.*, FCC 82R-68, released November 26, 1982.

11. *Ownership of Tele-Communications*: Tele-Communications will receive only 66.6% integration credit because one of its directors withdrew from the proposal after testifying at the hearing. *I.D.*, paras. 91–93. Under established practice, *see e.g., New Continental, supra*, 88 FCC 2d at 842–44, the ALJ held that the corporation could not be restructured at that late point to retain 100% integration credit. *I.D.*, paras. 140–141. Tele-Communications' ownership credit

was further reduced by the ALJ who found, *I.D.*, paras. 93–105, and concluded that the company was "in reality, nothing more than the broadcasting subsidiary of Trinity Church," and therefore was only entitled to credit for 16.6% integration. *I.D.*, paras. 142–146. In its brief, Tele-Communications urges that a correct application of precedent by the ALJ would have resulted in its receiving credit for 100% integration, even though a director withdrew late in the comparative process, and that reliance on *New Continental, supra*, is misplaced. (Br. 22–30). Tele-Communications also argues that it is completely separate from Trinity Church; that no real party in interest issue was designated in this case; that controlling precedent was misapplied or ignored; that the relationship between the two entities should be evaluated in a religious rather than a business context; that the "corporate fiction-alter ego" doctrine is inapplicable here; and that the evidence of control by the Church was not substantial. (Br. 5–21)

12. The ALJ's ruling that Tele-Communications may not restructure in response to one of its director's voluntary withdrawal at a very late stage in the comparative process is affirmed. Under established comparative practice an applicant will not be permitted to modify its proposal to retain a comparative advantage if a principal voluntarily withdraws after the time for amending as a matter of right has expired. *See, New Continental, supra*, see also additional cases discussed in *Birmingham Family Television*, FCC 82R-59, released October 4, 1982. Here the voluntary withdrawal of one of the directors because of "a theological schism" (Tr. 1015) came very late in the comparative process. An exception is made to the general rule in cases of involuntary changes such as those caused by the death of a principal. That exception does not apply in this case. The general rule is designed to insure fairness to all parties in the comparative case and we will not belabor this point because this matter has been recently fully reviewed, discussed and applied in several similar factual settings. *See, e.g., Birmingham Family, supra*, paras. 8–10.

13. The Board will not further reduce Tele-Communications' 66.6% credit because of its affiliation with the Trinity Church. Although the parties apparently had actual notice that the issue was being litigated since they were trying to raise similar issues against each other (Tr. 1040–42), I.D., para. 151, we agree with Tele-Communications that designation of a specific issue is more in accord with past agency practice. Br. 6–8. Our decision in *Henderson Broadcasting Co.*, 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977), should be considered a narrow exception to the rule that a specific issue is necessary before a competing applicant will be permitted to inquire into a real party in interest question. *Henderson* did not involve a "third party" to the hearing. Moreover, the requirement that specific issues must be sought and justified will permit the ALJ

to retain firmer control over comparative proceedings where competitors are naturally tempted to try to undermine their opponents in every possible manner. *Compare* 1965 *Policy Statement*, 1 FCC 2d at 399–400.[1] We find merit to Tele-Communications' contention that as a matter of law, absent exceptional circumstances, the corporate veil should be pierced only with great caution. (Br. 15). This is especially true in cases where there has been no showing that the separate corporation was established to circumvent the Commission's authority. See *GTE Service Corpv. FCC*, 474 F.2d 724, 733 (2d Cir. 1973).

14. *Alamo's Minority Owners*: In reply Alamo maintains that it should also have received full quantitative and enhancement credit for its minority owners. It notes that all minority stockholders testified that they were personally liable for their stock; that Mr. Lopez participated in the negotiations for the Alamo loan and would pledge his net worth if required; that Mr. Myart testified that he attempted to obtain independent financing before turning to Paris Schindler and still felt he was financially responsible. Relying on *Berryville Broadcasting Co.*, 70 FCC 2d 1, 7–8 (Rev. Bd. 1978), Alamo argues that even if the minority stockholders had been given their stock their *bona fide* ownership should have been credited because they will be fully integrated into meaningful positions in the management of the station. Br. 16–19.

15. After the matter had been fully explored at the hearing and considered in his findings, the ALJ concluded (I.D., para. 154):

> There is no showing here that Paris Schindler lacked good faith in adding the minorities to Alamo's application. Those minorities recognized their limited stock interest. The fact that Paris Schindler arranged for and guaranteed the bank loans to enable the minorities to purchase their stock is not something that should be criticized. It has long been recognized by the Commission that a lack of financing has been a formidable obstacle to minority ownership and participation in broadcasting. Paris Schindler, by financially underwriting the purchase of stock by the minorities, has given these young minorities a stake in a television broadcast station which they would otherwise not have. Even if that stake is small, individually or collectively, it is still

[1] Finally, Tele-Communications continues to press its allegations about "Alamo's secret ownership agreement" and reporting violations. (Br. 31–40). After fully exploring these matters both in our review of the pleadings and at oral argument, we are convinced by the ALJ's resolution of these matters at the hearing, and by the Bureau's Reply Brief, pp. 2–5, that this is the traditional "much ado about nothing" that has become routine in comparative hearings. See cases cited in *Millard Orick, Jr.*, 89 FCC 2d 571, 573 and Note 1 (Rev. Bd. 1982). Its claim that the ALJ erred in applying the divestiture requirements (Br. 41–43) is simply wrong. See *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982); *compare Morris, Pierce & Pierce*, 88 FCC 2d 713, para. 6 (Rev. Bd. 1981); *Muncie Broadcasting Corp.*, 89 FCC 2d 123, para. 13 (Rev. Bd. 1982); *Thomas C. & Essie L. Collins*, FCC 82D-56, released August 3, 1982, para. 17, exceptions pending.

> better than nothing. While the addition of the minorities was designed to enhance the comparative posture of the Alamo application, the characterization of this action as "cynical" is unsupported. (Footnotes omitted)

We concur fully in this conclusion and with the ALJ's additional recognition that in *Klein*, *supra*, the Commission credited minority ownership and integration where the stock was acquired by a gift. Our action on this matter is squarely controlled by the Commission's decision in *Klein*. On a review of the ALJ's findings, I.D., paras. 24–70, and the parties contentions, we are convinced that the showing required in *Klein*, 86 FCC 2d at 431–432, has been made by Alamo. Accordingly, it will be credited with 99% quantitative integration enhanced by minority ownership and local residence. Moreover, as the ALJ has already found, Alamo's integration preference is also slightly enhanced because Paris Schindler will move to San Antonio, *I.D.*, para. 149, enhanced because Ms. Schindler, a woman, will relocate, *I.D.*, para. 150, and is further enhanced because Mrs. Davis is a woman, a local resident, and has been involved in several local organizations, *I.D.*, para. 151.

Summation

16. Alamo's proposed 99% participation of owners full time in the management of the station is enhanced by local residence, minority ownership, female ownership, and therefore it is substantially superior to the two remaining competitors. Because of its qualitative superiority Alamo would be superior to Tele-Communications even if we had awarded that applicant 100% quantitative integration. As previously noted, the ALJ substantially enhanced Las Misiones' 12.5% integration because of Dr. San Martin's minority status, his local residence and outstanding community activities, plus merit because of minority participation of its directors. Nevertheless he concluded that Las Misiones' proposal was not sufficient to overcome Alamo's substantial comparative advantage. *I.D.*, para. 155. His conclusion correctly applied the 1965 *Policy Statement* and relevant Commission precedent. We therefore affirm his grant of the application of Alamo Broadcasting Corporation.

17. ACCORDINGLY, IT IS ORDERED, That the Motion to Accept Transcript Corrections filed on January 20, 1983 by Christian Tele-Communications, Inc. IS GRANTED; and

18. IT IS FURTHER ORDERED, That the applications of Las Misiones De Bejar Television Co., BPCT-5235, and Christian Tele-Communications, Inc., BPCT-5245, ARE DENIED; the application of United Television Broadcasting Corporation, File No. BPCT-5248, IS DISMISSED, pursuant to 47 CFR 1.276(f); and the application of Alamo Broadcasting Corporation, BPCT-5244, IS GRANTED, subject to the following condition:

Prior to construction of the TV tower authorized herein, permittee

shall notify AM Station WOAI so that the station may determine operating power by the indirect method. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the aforementioned AM station. Subsequent to construction of the TV tower and installation of all appurtenances thereon, antenna impedance measurements of the AM antenna shall be made and sufficient field strength measurements obtained at at least 10 locations along each of eight equally spaced radials shall be made to establish that the AM radiation pattern is essentially omnidirectional and, the results submitted to the Commission in application for the AM station to return to the direct method of power determination. Thereafter the TV station may commence *Limited Program Tests.*

JOSEPH A. MARINO *Chairman, Review Board*

FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAS MISIONES DE BEJAR TELEVISION CO. San Antonio, Texas	BC Docket No. 81–647 File No. BPCT-5235
ALAMO BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–648 File No. BPCT-5244
CHRISTIAN TELE-COMMUNICATIONS, INC. San Antonio, Texas	BC Docket No. 81–649 File No. BPCT-5245
UNITED TELEVISION BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–652 File No. BPCT-5248
For Construction Permit	

APPEARANCES

James P. Riley, David Sternlicht on behalf of Hubbard Broadcasting of San Antonio, Inc.; *William K. Keane, Norman Leventhal, Dennis Corbett* on behalf of Las Misiones De Bejar Television Company; *R. Clark Wadlow, Meredith Senter, Robert Beizer* on behalf of Alamo Broadcasting Corporation; *James Gammon, George R. Grange, II* on behalf of Christian Tele-Communications, Inc.; *William S. Green* on behalf of Lee Enterprises, Incorporated; *William P. Bernton* on behalf of Tejas Broadcasting Company; *Thomas W. Fletcher* on behalf of United Television Broadcasting Corporation; and *Stephen T. Yelverton* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge Joseph Stirmer

(Issued: July 29, 1982 Released: August 4, 1982)

Preliminary Statement

1. This proceeding was designated for hearing by Order of the Chief, Broadcast Bureau, released September 24, 1981. Originally, seven mutually exclusive applications were designated for hearing.

However, the applications of Hubbard Broadcasting of San Antonio, Inc., Lee Enterprises, Incorporated, and Tejas Broadcasting Company were dismissed with prejudice prior to the commencement of the hearing[1] thereby leaving only four applicants, Las Misiones De Bejar Television Co. (Las Misiones), Alamo Broadcasting Corporation (Alamo), Christian Tele-Communications, Inc. (CTI) and United Television Broadcasting Corporation (United) still vying for the facility at issue in this proceeding. The order of designation specified the following issues against the remaining four applicants:

1. To determine with respect to United Television Broadcasting Corporation:
   (a) the source and availability of $2,056,916 to construct its proposed station and operate it for three months;
   (b) whether, in light of the evidence adduced pursuant to the foregoing issue, applicant is financially qualified.
2. To determine, on a comparative basis, which of the applications would best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on November 25, 1981. The hearing convened in Washington, D.C. on January 26, 1982 and continued through January 29, 1982. The hearing resumed on February 5, 1982 for the completion of testimony, and the record was closed that same day. The record was reopened on May 3, 1982 for the purpose of receiving an amendment to the CTI application and was again closed that same day.

3. Proposed findings of fact and conclusions of law were filed by the parties on April 30, 1982. All but one of the applicants also filed reply findings on May 14, 1982.

Findings of Fact

Las Misiones De Bejar Television Co.

4. Las Misiones De Bejar Television Co. (Las Misiones) was incorporated on June 15, 1978 for the purpose of applying for a construction permit to build and operate a television station on Channel 29, San Antonio (Las Misiones Exh. 1).

5. The officers, directors and stockholders of Las Misiones are as follows (*Id.*):

[1] The application of Hubbard Broadcasting of San Antonio, Inc. was dismissed by Order of the Presiding Judge (FCC 82M-0661) released March 1, 1982 and the application of Lee Enterprises, Incorporated was dismissed by Order of the Presiding Judge (FCC 82M-0654) released March 1, 1982. The application of Tejas Broadcasting Company was dismissed by Order of the Presiding Judge (FCC 82M-0736) released March 4, 1982.

	Office	*Director*	*Stock Interest*
Dr. Jose San Martin, Jr.	President	Yes	12.500%
Dr. Ismael Guajardo	1st Vice-President	Yes	16.660%
Dr. Felix P. Majul	2nd Vice-President	Yes	8.000%
Cesar A. Gutierrez	Treasurer	Yes	5.000%
Louis F. Flores	Secretary	Yes	4.166%
Carlos R. Chavez	----------	Yes	10.000%
Dr. Roberto San Martin	----------	Yes	5.772%
Raul B. Fernandez	----------	Yes	17.894%
Gerardo S. Gonzales	----------	No	20.000%
Arthur Troilo, Esq.	Asst. Secretary	No	----------

6. Las Misiones is comprised entirely of Hispanic-Americans. According to 1980 Census data, the Hispanic-American population of San Antonio is approximately 421,774 persons or 53.7% of the population (*Id.*) Moreover, the Hispanic-American population of surrounding Bexar County is 460,911 persons, or 46.6% (*Id.*)

7. Each of Las Misiones' principals is a resident of San Antonio, in most cases for many years (Tr. 46). For example, Las Misiones' president, Dr. Jose San Martin, Jr., has lived and worked continuously in San Antonio since 1949 (Las Misiones Exh. 2, p. 2).

8. Aside from this application, Las Misiones has no other media interests; nor do any of Las Misiones' other officers, directors or stockholders (Las Misiones Exh. 1, p. 2).

9. Dr. Jose San Martin, Jr., Las Misiones' president, director and 12.5% stockholder, would be full-time general manager for the station (Las Misiones Exh. 2, pp. 1, 5).

10. Dr. San Martin was born on October 12, 1916 in Torreon, Choahuila Mexico. He resided in Mexico until his move to the United States in 1929. He became a U.S. citizen in January 1944. Dr. San Martin is bilingual in Spanish and English (Las Misiones Exh. 2).

11. After grade school and high school, Dr. San Martin entered St. Mary's University in San Antonio in 1944 where he studied three years concentrating on courses preparatory for education in optometry. In 1947 he entered the Los Angeles College of Optometry in Los Angeles, California where he studied for two years. He graduated in June 1949 with a degree in Optometry. Upon his graduation, Dr. San Martin returned to Texas and successfully completed the optometry examination administered by the State Board of Examiners. Dr. San Martin has practiced optometry continuously in San Antonio since August 1949 (*Id.*).

12. Dr. San Martin initiated and helped organize the group which became Las Misiones. He has from the beginning of the project occupied a principal position in preparing, filing and advocating a grant of the application. Among other matters, he contacted and retained local and FCC counsel, reviewed equipment estimates, helped secure financing and helped formulate Las Misiones' programming plans. As general manager, he will manage day-to-day operations and answer to the Board of Directors and stockholders for the station's performance including its programming service, its financial success, its employment practices, budget development and contract negotiations (*Id.*).

13. As a member of the Board of Directors he will participate in discussions relating to these and other topics and cast his vote in Board meetings (*Id.*).

14. Dr. San Martin will also serve on the Program Policy Committee, described hereafter (*Id.*).

15. Currently Dr. San Martin serves on the Board of Directors of the Valero Energy Corporation (a processor and distributor of natural gas) and the San Antonio City Water Board (*Id.*).

16. Dr. San Martin has been reducing the time spent on his optometry practice. Three of his sons are optometrists who have been and will be assuming an increasing share of the practice. In the event of a grant of the Las Misiones application, neither his optometry practice (which would by then require only a very small amount of time) nor his Board memberships (which require only occasional meetings) will interfere with his commitment to devote full time to his duties as general manager of the television station (*Id.*).

17. Among his numerous activities over the years, Dr. San Martin was an elected member of the San Antonio City Council during the period 1956–60; from 1961–64 a member of the Board of Managers of the Bexar County Hospital District; from 1963–69, a member of the Board of Regents of the State Senior Colleges; in 1966 a member of the White House Planning Conference for Mexican-Americans; from 1967–68, a member of the Department of Health, Education and Welfare Committee on Dyslexia and related reading problems; in 1968 a member of the Executive Committee of Hemisfair, the World's Fair held in San Antonio that year; and from 1973–75 again a member of the San Antonio City Council and, in addition, Mayor Pro Tempore (Las Misiones Exh. 2, pp. 3–4).

18. Dr. San Martin has also served on the following boards: Board of Trustees, Southwest Research Institute; Sembradores de Amistad, an organization dedicated to the improvement of relations between the United States and Mexico; the Executive Committee of the International Black and White Ball; the Board of Our Lady of the Lake University in San Antonio; the Board of Governors of the Cancer Therapy and Research Foundation; the Board of Directors of

Prevent Blindness, the Texas Society for Prevention of Blindness; the United Way Executive Committee; and Chairman of the Public Sector, United San Antonio, a campaign to foster economic development in the area (*Id.*).

19. Among his other activities of service to the community, Dr. San Martin has moderated on an unpaid basis the Civic Awareness Program on Spanish-language station KWEX-TV, San Antonio. This one-half hour weekly program concentrated on community problems and needs. Dr. San Martin was responsible for selecting the topics for discussion and the participants. He served as moderator for a total of six years (from 1956–60 and again from 1975–77) (*Id.* at 4).

20. During the period 1953 through 1977, Dr. San Martin received 50 civic awards and honors (*Id.* at 6–8).

21. Las Misiones' Directors will serve six-month terms on the Program Policy Committee whose other members will include the general manager, program director, news and public affairs director, and the sales manager (Las Misiones Exh. 3). The Program Policy Committee was part of Las Misiones' original plans and was discussed among the directors and stockholders from the very beginning of their organizing efforts (Tr. 54–55). Each of the directors has confirmed their willingness to serve on the committee and to devote one day per week to its functions during their terms (Tr. 62–63).

Alamo Broadcasting Corporation

22. Alamo Broadcasting Corporation (Alamo) is comprised of the following stockholders, the chart showing the position, number of shares owned or subscribed, and the percent of stock ownership for each stockholder:

Name	*Position*	*No. Shares Owned or Subscribed*	*Percent of Stock Owned*
Paris R. Schindler	General Manager	22,500	45
Sherry L. Schindler	Program Manager	15,000	30
Phyllis G. Davis	Assistant General Manager & Women's News Director	7,500	15
Reynaldo H. Lopez	Business Manager	1,000	2
James W. Myart, Jr.	Promotion Manager	1,500	3
Jo Long	Community & Cultural Affairs Director	1,000	2

Name	*Position*	*No. Shares Owned or Subscribed*	*Percent of Stock Owned*
Franklin D. Collins	News Manager	1,000	2
Ray Jimenez[2]		500	1

23. Herbert G. Davis, the husband of Phyllis G. Davis, was the prime mover of Alamo originally (Tr. 840). He formed and put the corporation together in 1976, with the intent of applying for Channel 29 at San Antonio (Tr. 110–12). In 1978, prior to filing the Alamo application, Mr. Davis was to have 15% of the corporate stock, and the Schindler family was to have 85%, with 10 to 15% of the Schindler's 85% interest set aside for minorities.[3] The Schindlers were also to help finance the minorities' stock interests (Tr. 899–901).

24. On May 12, 1981, a Memorandum of Agreement was entered into relative to the ownership and financing of Alamo (CTI Exh. 6). This agreement was prepared by Herbert Davis and was signed by Herbert Davis, Phyllis Davis, Paris Schindler and Sherry Schindler. The Memorandum of Agreement provides, *inter alia*, that Paris R. Schindler and Sherry L. Schindler (hereinafter sometimes referred to as the "Schindlers") shall own 75% of Alamo stock, and that the Schindlers will arrange financing to obtain the construction permit (CTI Exh. 6, p. 1). Neither Herbert G. Davis, nor Phyllis G. Davis, will participate or underwrite or guarantee financing the application effort except for the payment of a total of $7,500 for a 15% stock interest. And, the minorities will acquire their 10% of the stock (of Alamo) through non-personal liability loans at a bank arranged by the corporation, at Schindlers' responsibility (CTI Exh. 6, p. 2, para. 4). The agreement further refers to the transfer of 1,500 shares of Alamo from Herbert to Phyllis Davis and her obligation to pay $6,000 for an additional 6,000 shares of stock (CTI Exh. 6).

Paris R. Schindler

25. Paris R. Schindler is president of Alamo. He owns and has subscribed to a total of 22,500 shares of Alamo stock, 45% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, he will move to San Antonio and will devote at least 40 hours a week to his duties as general manager of the station (Alamo Exh. 2(a)). Mr. Schindler has been a lifelong resident of Houston, Texas, where he owns two homes (Tr. 836). Mr. Schindler is the president of Hurricane Drilling Company, a

[2] In Alamo's 5/15/81 amendment, Ray Jimenez was listed as a 1% stock subscriber (Tr. 137, 234–35). Thereafter, Alamo reported his withdrawal. Apparently his stock subscription has not been taken over by any other principal and his 1% of the stock is being set aside for a key employee stock option program (Tr. 930).

[3] As used herein, minorities refer to racial minorities.

company that was in the process of being sold and wound down (Tr. 849).

Sherry L. Schindler

26. Sherry L. Schindler, the sister of Paris Schindler, is secretary/treasurer of Alamo. She has subscribed to 15,000 shares of Alamo stock, 30% of the total stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, she will move to San Antonio and will devote at least 40 hours a week to her duties as program manager for the station (Alamo Exh. 2(b)). She, like her brother, has been a lifelong resident of Houston, Texas (Tr. 198). She has never lived in San Antonio (Tr. 197). She owns and operates a bike and backpack shop in Houston (Tr. 212). She will discontinue the management of this shop if Alamo is successful (Tr. 212).

27. Ms. Schindler was not involved in arranging Alamo's financing, including the $375,000 loan commitment to her for the acquisition of her stock. Her brother, Paris Schindler, made all the arrangements for the loan commitments even though they involved her personal guarantee (Tr. 215–16, 249–51). She did not participate in the process of selecting the five minority principals who were introduced into Alamo's application (Tr. 226). She knew none of these five individuals at the time they were brought into Alamo's application (Tr. 227). When she, along with other Alamo principals, took action to include these new principals she had not personally met any of them (Tr. 237). She subsequently met four of the new principals, but the fifth, Mr. Reynaldo Jimenez, who later withdrew from Alamo, she has never met (Tr. 237).

28. Her role as program manager was suggested by a consultant to Alamo, and her brother, Paris (Tr. 208). There is nothing in writing describing her duties and responsibilities as program manager (Tr. 211). No fixed salary has been discussed for her position (Tr. 212). Initially, in early 1978, she declined to work full time at the proposed station because of personal turmoil including the process of getting a divorce. Subsequently, after these matters were settled, she changed her mind and decided to devote full time to the proposed station. This was done at the urging of her brother, to get a higher degree of ownership and management (Tr. 204–05).

Phyllis G. Davis

29. Phyllis G. Davis is a vice-president of Alamo. She has been a resident of San Antonio since 1945. She owns and has subscribed to a total of 7,500 shares of Alamo stock, 15% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, she will devote at least 40 hours a week to her duties as assistant general manager and women's news director for the station (Alamo Exh. 2(c)).

30. Mrs. Davis has resided in San Antonio since October 1945, where she has participated in the following civic activities (*Id.*):

Secretary, San Antonio Bar Auxiliary, approximately 1962–1964.

Treasurer, Northeast PTA Council, approximately 1965–1966.

Member, Regional Board of Directors, Arthritis Foundation, approximately 1975–1981.

Member of the Board of Directors and Personnel Chairman, Jewish Day School of San Antonio, 1979 to present (Tr. 190).

31. Mrs. Davis has been a school guidance counselor since 1968 or 1969. Prior thereto she was a teacher. She began teaching about 25 years ago (Tr. 178–79). Ms. Davis has never had a management role in a business (Tr. 139, 179).

32. With regard to her duties as assistant general manager, Ms. Davis would fulfill the duties of general manager in that person's absence (Tr. 180–81). In this connection, Mrs. Davis would be responsible for interviewing and making hiring recommendations although she has not discussed specifics with Paris Schindler (Tr. 184, 186).

33. While Mrs. Davis will be the "assistant general manager", she and Franklin Collins, the proposed news director, would be co-equal in management, but she would answer to Collins when she was performing the duties of women's news director (Tr. 143).

34. As noted, Phyllis Davis is the wife of Herbert Davis. When the application was filed in 1978, Mrs. Davis' participation was limited to being a member of the Board of Directors (Tr. 110). She did not become a stockholder until 1981 (Tr. 113). In that year her husband transferred his 1,500 shares to her (Tr. 117, 151–52).

35. Herbert Davis, as already noted, was the original prime mover in Alamo and its first president (Tr. 111, 839–41). Davis was instrumental in putting the group together; in drawing up the corporation charter in 1976; and in interviewing and selecting the minority-group stockholders (Tr. 110, 839–41). He continues as the corporation's local counsel (Tr. 889–91). He also maintains the public file and keeps the corporate records at his office (Tr. 182). Meetings of the stockholders are sometimes held at his office. Herbert Davis officially withdrew as a stockholder from the Alamo application with the filing of the May 1981 amendment (Tr. 884–89; CTI Exh. 6).

36. According to Paris Schindler, Mrs. Davis was essentially being "carried" by Alamo for her 15% interest and that the price for her stock, i.e. $1.00 per share, reflected the value of services previously rendered by her husband (Tr. 841–42). In contrast, other stockholders (including the minority-group subscribers) are required to pay $25.00 per share (e.g. Tr. 274–77, 372).

37. Mrs. Davis obtained her stock in Alamo as a gift from her husband although funds from a joint account were used to purchase the shares. She stepped into her husband's shoes, and in her words ". . . I now maintain his position" (Tr. 152).

38. Mrs. Davis has had no role in negotiating Alamo's bank loan or any other financial aspect of the application (Tr. 144, 177). Her involvement in Alamo's application has included conducting some of the leadership ascertainments and attending Board of Director's and stockholder meetings (Tr. 136, 138). She disclaimed having any real expertise for her proposed position and she has no communications experience (Tr. 139). She has not discussed with the proposed news manager, Mr. Frank Collins, how the news department would be run (Tr. 140). She has not discussed salary and she has not told her school principal, where she has been employed since 1965, that she is committed to leave her job and go to work for Alamo if such application is successful (Tr. 140, 147, 148). There will be no problem in leaving her school board position (Tr. 149).

Reynaldo H. Lopez

39. Reynaldo H. Lopez is a vice-president of Alamo. He has subscribed to 1,000 shares of Alamo's stock, 2% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, Lopez proposes to devote at least 40 hours a week to his duties as business manager of the station (Alamo Exh. 2(d)).

40. Mr. Lopez resided in San Antonio from his birth until 1981. In 1971, he received a Bachelor of Science degree in Radio, Television and Film from the University of Texas at Austin. In 1974, he received a Masters in Business Administration from Harvard University (*Id.*).

41. Mr. Lopez currently resides in Carrollton, Texas, a suburb of Dallas, where he is employed as the Regional Administrator, Region 6, of the Small Business Administration. He maintains a house in San Antonio that is under lease. He proposes to move back to San Antonio if Alamo is granted the construction permit for Channel 29. He is Hispanic (*Id.*).

42. Mr. Lopez has participated in the following civic activities in the San Antonio area (*Id.*):

S.A. Alumni Steering Committee, Greater San Antonio Chamber of Commerce Leadership, Summer 1981 to present.
Member, Texas Industrial Development Council, 1979 to present.
Member, Southern Industrial Development Council, 1979 to present.
Member, Council on Urban Economic Development, 1979 to present.
Member, St. Mary's School Board of Directors, 1979 to May 1981.
Member, San Antonio Business and Economic Society, 1979 to present.
Member, United Way Allocation Panel, 1980 to present.
Member, El Rey Feo Education Fund, LULAC, 1981.

43. While a student, Mr. Lopez held the following positions with broadcast stations (*Id.*):

May 1972 -	Full-time	KTSA, KTFM
September 1972	Newsman	San Antonio, Texas
January 1972 -	Full-time	KNOW
May 1972	Newsman	Austin, Texas
June 1971 -	Part-time	KNOW
January 1972	Newsman/Student	Austin, Texas
January 1971 -	Full-time	KLRM(TV), KUT
May 1971	Newsman/Student	Austin, Texas
January 1970 -	Full-time	KSYM-FM
May 1970	Newsman/Student	San Antonio, Texas

44. Mr. Lopez was first contacted about the Alamo application in early 1981 (Tr. 269). He had discussions with Paris Schindler, Herbert Davis and possibly Bill Carter, a consultant to Alamo (Tr. 273). His decision to participate as an Alamo stock subscriber coincided with his signing the stock subscription agreement on May 12, 1981 (Tr. 298, 299–300). He did not see Alamo's application prior to joining Alamo (Tr. 281). Since then he has only seen parts of the application during the 6–8 month period preceding the hearing and does not recall whether he has seen the ascertainment portion (Tr. 283, 288).

45. Mr. Lopez has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 292, 293, 329, 953). His stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 354–55).

46. As Regional Administrator, Lopez holds a Presidential Appointment. He is a member of the Senior Executive Service and is, as he said, at "the max" GS-Grade earning $50,112 per year. Prior to accepting the appointment, Lopez was making approximately $35,000 per year (Tr. 288–90). As Regional Administrator, Lopez is responsible for the operation and performance of some 570 employees grouped in 11 districts and two branch offices across five states—Texas, Louisiana, Oklahoma, New Mexico and Arkansas (Tr. 288). He expects to serve in office through the duration of the Reagan Administration (Tr. 313).

47. Lopez has had no discussions with Paris Schindler relative to his salary although he had discussed salary questions with other proposed management-level people (Tr. 290, 345). As far as the responsibilities of his proposed position are concerned, he believed that in the beginning they "perhaps" would have need for a "bookkeeper/secretary-type person", but has not discussed specific staffing with Paris Schindler (Tr. 290).

48. In answer to a specific question as to whether he would quit

his SES/Presidential Appointee position to work for Alamo, Lopez initially said "Sure; yes, I would"; but then added (Tr. 360–61):

> I would certainly want to evaluate it and look at all the—you know, at that point is when I start asking the questions you all have been asking me up to now, how much money will be paid, am I going to be able to survive on whatever we are able to work out, what kind of financial terms are we going to be able to arrange, how do the pro formas look, do the sales look like we are going to be able to pay back the loan, does it look like it is going to be a profitable deal for me. I mean those are the kind of—at that point is when I start—we start talking about what are the relevant issues.

49. Subsequent to the reporting of Mr. Lopez' role in Alamo he responded to the invitation of a Mr. Gary Munson and became involved in an applicant for an FM station in Lockhart, Texas (Tr. 316–17). This application, which was filed by Texas Professional Communications in August 1981, reported Mr. Lopez as a 15% stock participant (Tr. 324; 327–28); as proposed vice-president and general manager of the FM station (Tr. 328); as proposing to establish residence in Lockhart, Texas upon grant of this application (Tr. 332); and as proposing to join the local Lockhart Chamber of Commerce and other civic groups (Tr. 332–35). Further, Mr. Lopez apparently initiated the $900,000 loan request from Frost National Bank. Mr. Lopez got involved in the Lockhart deal because he "was just trying to create options" (Tr. 319). According to Lopez, if the Lockhart grant comes prior to a grant to Alamo, "I would take a look at it and if it looks like a good deal, I will go after the Lockhart deal, but subsequent to that, if the Alamo deal presented itself, even after Lockhart, I would pursue that Alamo deal . . ." (Tr. 335–36).

James W. Myart, Jr.

50. James W. Myart, Jr. has subscribed to 1,500 shares of Alamo, 3% of the total amount of stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, he proposes to devote at least 40 hours per week to his duties as promotion manager for the station (Alamo Exh. 2(e)). He has never worked in such capacity at a broadcast station (Tr. 478).

51. Mr. Myart, a Black citizen, has resided in San Antonio since his birth on October 4, 1954. Mr. Myart is currently employed as director for the Department of Motor Vehicle Registration, Bexar County, San Antonio, Texas (Alamo Exh. 2(e)).

52. Mr. Myart has participated in the following civic and local activities in the San Antonio area (*Id.*):

> Superintendent, Second Cumberland Presbyterian Church Sunday School, 1975-present.
>
> Member, United Negro College Fund, Executive Board, 1978-present.

Member, Leadership San Antonio Steering Committee, 1978-present.
Member, KLRN Community Advisory Committee, 1981-present.
Chairman, San Antonio Voter Registration and Awareness Program, 1977-present.
Chairman, Political Action Committee for Black Concerns, San Antonio, 1981-present.
Member, Carver Restoration Committee, San Antonio, 1976–77.
Member, Washington Workshops Advisory Committee, Washington, D.C., 1972-present.
Member, Mayor's Eastside Advisory Committee, 1980-present.
Member, Mayor's Committee on Neighborhoods, 1981-present.
Member, Mayor's Prayer Breakfast Committee, 1981-present.
Member, Mayor's Commission on Southern Sector Economic Development

53. Myart was first contacted about joining Alamo in late 1978 or early 1979 by Seth Newberger and about two months later met with Newberger and Herbert Davis in the latter's offices (Tr. 466–68). Myart learned that Newberger was an investor and that Davis was essentially engaged in an effort to reconstitute a prior Channel 29 venture (Tr. 495–96). Although Myart decided to participate, he was not actually brought into the corporation until May 1981 (Tr. 474). Mr. Myart is neither an officer nor a director of Alamo (Tr. 470, 476–77, 479–80). He does not know why he was not made an officer or director (Tr. 479). Mr. Myart has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 293, 516, 953). His stock acquisition of $37,000 is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 472, 500–01). Mr. Myart has never worked at a broadcast station before and he does not claim any past broadcast experience (Tr. 485).

54. At Mr. Reynaldo Lopez' invitation, Mr. Myart became involved as a principal in an application for a new FM station in Lockhart, Texas (Tr. 509, 511). Mr. Myart is proposed as a 5% stockholder (50 shares), serving full time in a management-level position (Tr. 510–11). The Lockhart application proposed that Myart would "join the local Lockhart Chamber of Commerce and other civic groups" (Lockhart 301 application, Ex. IV-H). Myart is maintaining his involvement in the Lockhart application as an option and that if the Lockhart application is granted before any action on Alamo, he would probably go to work for Lockhart though his total commitment is to Alamo (Tr. 511, 516).

Jo Long—Integration

55. Jo Long is a vice-president of Alamo. She has subscribed to 1,000 shares of its stock, 2% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas,

she proposes to devote at least 40 hours per week to her duties as community and cultural affairs director for the station (Alamo Exh. 2(f)).

56. Ms. Long, a Black citizen, has resided in San Antonio since 1976. She is currently employed as a free-lance consultant in arts administration. She also served as a panelist on the National Endowment for the Arts until 1982. From 1976–79 she was employed as the director of the Carver Community Cultural Center. In that capacity, she produced and negotiated contracts for programs in the performing and visual arts (*Id.*).

57. Ms. Long has participated in the following civic activities in the San Antonio area (*Id.*):

Executive Committee, United Negro College Fund, 1976–77.
Board of Directors, Alamo Branch YWCA, 1976.
Member, Pine Street YWCA, 1977.
Board of Directors, Metropolitan YWCA, 1977–78.
Board of Directors, River City Media Center, 1978-present.
Advisory Board, San Antonio Ballet Company, 1977–78.
Member, Mexican American Cultural Center "One City-Many Cultures" Advisory Board, 1979–80.
Board of Directors, Cameo Cabaret Players, 1980-present.
Member, National Hook-Up of Black Women, Inc., 1981-present.
Member, Political Action Committee for Black Concerns, 1981-present.
Advisory Review Panel, Arts Council of San Antonio, 1976.
Senator Glenn Kothmann Legislative Advisory Committee, 1981-present.
Board of Directors, Symphony Society of San Antonio, 1979-present.
Opera Study Committee, 1980.
Public Relations Committee, 1981-present.
Commissioner, Fine Arts Commission, 1980-present. Conducted interviews to document the contributions of Black women in San Antonio from 1900–1950 as a special project for the National Council for Negro Women, 1980.
Fine Arts School Advisory Committee, University of Texas at San Antonio, 1979-present.
Texas Commission on the Arts, 1979-present.
Music Advisory Panel, 1979–80.
Elementary Secondary Act Advisory Panel, 1977-present.

58. Long was first contacted about the Alamo application by James Myart in late 1979 (Tr. 375). A couple of weeks later she met with Herbert Davis, Seth Newberger and Myart to discuss the matter (Tr. 375, 378). However, it was not until a meeting in Herbert Davis' office in May 1981, that she was told what the price per share would be, and that Paris Schindler had arranged financing for her

stock subscription (Tr. 381–82). Two or three days later Long decided to subscribe (Tr. 383).

59. Long did not see any portion of the application prior to signing her subscription agreement (Tr. 387). Although she was made a vice-president and a member of the Board of Directors, she was not asked for her consent or even advised of the matter beforehand (Tr. 383–84). She was told that she had been made a director on the day she signed the stock subscription agreement, i.e., May 12, 1981 (Tr. 403–04).

60. Ms. Long has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 293, 393, 953). Her stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 393, 406). Ms. Long has never previously worked at a broadcast station and she does not claim any past broadcast experience (Tr. 388).

Franklin D. Collins—Integration

61. Franklin D. Collins has subscribed to 1,000 shares of Alamo, 2% of the total stock to be issued. If Alamo is granted a construction permit for Channel 29, San Antonio, Texas, he proposes to devote at least 40 hours per week to his duties as news manager of the station (Alamo Exh. 2(g)).

62. Mr. Collins, a Black citizen, has resided in San Antonio since 1964.

63. Mr. Collins has participated in the following civic activities in the San Antonio area (*Id.*):

Board of Directors, Alamo Branch, YMCA, 1965–66.
Board of Directors, Metropolitan YMCA, 1966–70.
Board of Directors, NAACP of San Antonio, 1965–81.
Board of Directors, Urban Coalition of San Antonio, 1968–74.
Board of Directors, San Antonio Press Club, 1965–73.
Board of Directors, United Negro College Fund, 1972–75.
Board of Directors, Economic Opportunities Development Corp., 1968–74.
Vice Chairman, Economic Opportunities Development Corp., 1972–74.
Board of Directors, United Way, 1970–76.
Precinct Committeeman, 1977-present.
Member, San Antonio Radio Broadcasters Association, 1972–76.
Member, National Association of Television & Radio Announcers, 1968–78.
Board of Directors, Alamo Branch YMCA, 1980–81.
Member, Alamo City Chamber of Commerce, 1970–81.

64. Collins was first approached regarding the Alamo application in late 1978 or early 1979 by Newberger (Tr. 410). Although he expressed interest in joining at that meeting, it was not until May

1981 that the specifics of his participation were firmed up and he actually became a stock subscriber (Tr. 414–15).

65. Prior to his subscribing to Alamo stock, Collins was asked to furnish information regarding his background and experience. That request did not seek information on any specific topics and Collins merely supplied Herbert Davis with a resume.

66. Collins had no input into the preparation of the Alamo application, its financal plan, proposed staffing, or ascertainment, and had never seen the complete application (Tr. 444). Although he is the proposed news manager, and had been contacted regarding the application as far back as late 1978 or early 1979, he was not consulted regarding the proposed news staff (Tr. 445).

67. Collins expects to be paid a salary commensurate with that earned by other news managers in San Antonio, which he understands to be in the range of $30,000 to $50,000 (Tr. 423–26). However, while his commitment to Alamo is contingent on a favorable salary, he has reached no agreement with the Schindlers in that respect (Tr. 423, 427).

68. Mr. Collins has paid no money to Alamo to date and is not required to contribute any money until Alamo's construction permit is granted (Tr. 293, 443, 953). His stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris Schindler and his sister (Tr. 415–16, 451–52).

69. Paris Schindler acknowledged that "the minorities" had no role in preparation of the application and that he and his sister would absorb all the expenses if Alamo is not awarded the construction permit (Tr. 943–44, 958).

70. Prior to the hearing, neither Lopez, Myart, Long nor Collins had ever seen the May 12, 1981 Memorandum of Agreement (Tr. 935). Paris Schindler had not shown the Memorandum to the minority stockholders because he did not want them to know that he and his sister were prepared to fully guarantee their loans (Tr. 937–38).

71. Alamo has no interest in any broadcasting station, cable television system, newspaper or other medium of mass communications other than its pending application for Channel 29, San Antonio, Texas (Alamo Exh. 3).

72. Individual shareholders of Alamo have the following other broadcast interests (*Id.*):

Licensee	*Paris R. Schindler*	*Sheery L. Schindler*
Fayette Broadcasting Corp.	16% ownership	16% ownership
KVLG, KMUZ(FM)	Vice-President	Vice-President
La Grange, Texas	Director	Director
Ozark Television Co.	15% ownership	15% ownership
KLMN(TV)	Vice-President	Vice-President
Fort Smith, Arkansas	Director	Director

Licensee	*Paris R. Schindler*	*Sheery L. Schindler*
Dogwood Broadcasting Corp.	5% ownership	
Permittee Channel 19	Vice-President	
Nacogdoches, Texas	Director	
Sage Broadcasting Corp.	5% ownership	
Permittee Channel 6	Vice-President	
San Angelo, Texas	Director	

73. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, Paris and Sherry Schindler will divest their interests in and resign all positions with the above-referenced companies, prior to the issuance of program test authority (*Id.*).

74. Reynaldo Lopez, a 2% Alamo shareholder, owns less than 1% of the stock of Nuestro Graphico, Inc., which owns approximately 51% of Nuestro Publications, Inc. Nuestro Publications, Inc. which is based in New York City, publishes *Nuestro Magazine* ten times a year. *Nuestro* is oriented towards a Hispanic audience (*Id.*).

Christian Tele-Communications, Inc.

75. CTI is a non-profit, non-stock Texas corporation.[4] Its only business is the prosecution of its application for a construction permit for Channel 29, San Antonio, Texas (CTI Exh. 1). At the time of the hearing, CTI was comprised of the following:

Name	*Office*	*Director*
Allen Ray Randolph	President	Yes
Kathleen Anne Ryan[5]	Treasurer	Yes
Elmer Leroy Hembrea	Secretary	Yes

76. CTI was incorporated on May 15, 1978 (Alamo Exh. 8). Its original Articles of Incorporation stated that the corporation was formed, *inter alia*, "to communicate the Gospel of Jesus Christ through various forms of media communications." (*Id.* at Art. 4) It was organized as a member corporation, with membership "limited to Christian citizens of the United States who have a bonafide interest in the attainment of the purposes set forth" in the Articles (*Id.* at Art. 5). The incorporators and original members of CTI's Board of Directors were Allen Randolph, Richard McPherson, and Elmer Hembree (*Id.* at Art. 7 and 8).

77. Slightly over one month later, CTI amended its Articles of Incorporation (Alamo Exh. 6). The restated Articles provided that the corporation "is organized as a non-profit religious corporation for

[4] As will be discussed *infra*, CTI has now been incorporated as a Delaware corporation with only two directors.

[5] As will be discussed later, Ryan resigned from CTI after the hearing.

the purpose of bringing glory to Almighty God by disseminating the Gospel of Jesus Christ and the other truths of the Holy Bible by whatever means possible . . . and for no other purpose." (*Id.* at p. 3) The revised Articles also changed the corporation from a membership to a non-member non-profit corporation (*Id.* at Art. 5).

78. CTI changed from a member to a non-member corporation at the suggestion of its Washington communications counsel. Mr. Randolph had forwarded communications counsel a copy of the original Articles and counsel had indicated that the corporation should be a non-member rather than member corporation (Tr. 768–70).

79. Neither Allen Randolph nor Elmer Hembree can recall why the Board decided to change from a member to a non-member corporation, although both were members of the Board when the change was made and testified that they recall discussing it (Tr. 643–50, 699–700, 770–71). Mr. Randolph does not recall asking why the change should be made until after his deposition in January 1982. According to Mr. Randolph, he does not know the difference between a member and non-member corporation or the significance of a non-member corporation (Tr. 770–71). Mr. Hembree recalls that the change was made about the same time that he was advised by counsel that his commitment to work full time at the station would benefit the application (Tr. 660–62).

80. The revised Articles also substituted Kathleen Ryan for Richard McPherson who was originally one of three directors (Alamo Exh. 6, Art. 8). The Board had discovered that Mr. McPherson was a Canadian citizen, and that his presence on the Board would prevent CTI from obtaining a television station license (Tr. 585).

81. CTI's Board is self-perpetuating (Tr. 575). Directors are elected for two-year terms by a majority of the other directors, and may be re-elected without limitation. Directors may be removed with or without cause by a majority vote of the directors. The number of directors on the Board may also be increased or decreased by a majority vote of the Board members. Directors may resign, provided that such removal or resignation would not be effective without prior FCC approval if such removal or resignation would result in transfer of control, as defined by the FCC (CTI Exh. 1; Tr. 575–76).

82. CTI originally proposed to integrate all of its directors into the full time management of its proposed Channel 29 facility (CTI Exh. 11, p. 1). In this connection, it was proposed in the application that Allen Randolph, CTI's president, would serve as program director of the station (Tr. 604).[6] In its written direct case, however, CTI stated that Mr. Randolph is to serve full time as general

[6] The response to question 27 merely recited that the three directors would work full time at the station in management roles. Elsewhere in the application, it was stated that Randolph would be program manager.

manager and program director (CTI Exh. 2). CTI intends to hire a person experienced in broadcasting as station manager to assist Mr. Randolph, and as soon as feasible will hire an experienced program director who will work under Mr. Randolph's direction and supervision (*Id.*).

83. Mr. Randolph is a white male (CTI Exh. 3). He presently resides in Hollywood Park, a separately incorporated suburb of San Antonio, but well within CTI's proposed city grade coverage. His residence is within the San Antonio postal district (Tr. 571–72; 604).

84. Mr. Randolph is a U.S. citizen born in Carbondale, Illinois on July 18, 1942 and has been a resident of San Antonio since July 1975. Mr. Randolph is married and has two children (CTI Exh. 3, p. 1). He was educated through all grade school levels in Granite City, Illinois. He attended Bethany Bible College, Santa Cruz, California, from September 1960 through May 1963, returning in 1966 to graduate with a Bachelor of Science degree (CTI Exh. 3, pp. 1–2). Mr. Randolph has spent most of his professional career in church service. He began his pastorship at Trinity Assembly Church in San Antonio in July 1975, and is currently senior pastor there. He also served as pastor at City Temple in Grant City, Illinois (September 1963 to January 1966) and at Faith Temple in San Jose, California (January 1966 to July 1975). (*Id.*)

85. Mr. Randolph has been on the Board of Directors from 1979 to 1981 of Teen Challenge (San Antonio), which is a drug abuse program. He presently serves on the board of Bexar County Detention Ministries, which provides and oversees the chaplaincy program for the Bexar County Jail. (*Id.*)

Elmer Leroy Hembree

86. Elmer Leroy Hembree, CTI's secretary and director, is proposed as the full time business manager of the station. In this capacity, Mr. Hembree will be responsible for establishing and supervising the station's business and accounting procedures and practices. Mr. Hembree described his responsibilities as business manager to include preparing policies and procedures as well as carrying on the "day-to-day operations of [the station] in the business area" (Tr. 624). Initially, he will not have a staff, but eventually will have someone to handle the nitty-gritty pencil and paper work through he will continue to supervise all business activities and be involved in the day-to-day operations as well (Tr. 625–26). Mr. Hembree was involved in preparing the application, conducted ascertainment, has attended all official board meetings of CTI and has contributed his own personal funds to help finance CTI's application (Tr. 629, 656, 663).

87. Elmer Leroy Hembree is a white male (*Id.*). Mr. Hembree resides in an unincorporated area of Bexar County which is within

the San Antonio postal district and well within CTI's proposed city grade coverage contour (Tr. 614, 715–16).

88. Mr. Hembree's education includes a two-year attendance at San Antonio College, majoring in business administration; one year at DeVry Technical Institute, majoring in electronics; and a one-year Bible seminar, majoring in theology. Mr. Hembree has also attended a number of military schools, primarily to enlarge upon his knowledge and skills in business administration.

89. Mr. Hembree served in the United States Air Force for 20 years, retiring as an E-8. His awards and decorations include: Korean Service Medal, United States Service Medal; National Defense Service Medal; Distinguished Service Medal; Good Conduct and Oak Leaf Clusters Commentation Medal.

90. Mr. Hembree has spent most of his professional career in business management. Between 1971 and 1976 he served as business manager at two corporations where he established and supervised operating policies and administrative functions. During this period, for approximately two years, he also was employed as assistant director for retail operations, where he established operating policies for four retail stores and managed a staff of 18. Mr. Hembree is currently employed as manager of nonproduction purchasing for the Datapoint Corporation, where he coordinates and supervises the purchase of all nonproduction goods and services. The annual purchase volume of the corporation approximates $15–20 million (Tr. 628–29).

Kathleen A. Ryan

91. Mrs. Kathleen A. Ryan was CTI's proposed public relations and sales director. She is a U.S. citizen, born in McAllen, Texas on April 17, 1938, and has been a resident of the San Antonio area for approximately 22 years. She presently resides at 319 Yosemite Drive, Hollywood Park, Texas, a separately incorporated suburb of San Antonio which is within the San Antonio postal district and well within the proposed station's service contours (Tr. 728, 763–64; CTI Exh. 3, p. 5). She unequivocally expressed her commitment to work at CTI's proposed station:

> I have always been committed to working at the station and I honestly don't know whether or not that's a requirement. I just simply have always been committed to doing that. I have a deep concern about this station and there's never been any question that I would be working (Tr. 737).

92. On February 9, 1982—just 11 days after giving the above testimony—Ryan addressed a letter to Randolph in which she stated:

> Please accept my resignation from the Board of Directors of Christian Tele-Communications. Also, the genuine commitment I have had to be an employee at Channel 29 should Christian Tele-

Communications be awarded that station can no longer be maintained.

I will be awaiting a written statement acknowledging my resignation as soon as possible. On March 2, 1982, counsel for CTI transmitted the letter of resignation to the Presiding Judge and the other parties and represented that an amendment reflecting Ryan's withdrawal would be filed in the very near future.[7] On April 9, 1982, CTI filed a petition for leave to amend seeking to reflect, *inter alia*, that Ryan had withdrawn, that Hembree had acquired Ryan's duties as treasurer and that, CTI was reincorporated as a Delaware corporation with only Randolph and Hembree as directors. The amendment was accepted for reporting purposes pursuant to Order of the Presiding Judge released May 3, 1982.

Relationship Between CTI and Trinity Church

93. All three of the incorporators and original directors of CTI were members of the Board of Elders of Trinity Church and the address of CTI and its registered office is at Trinity Church (Tr. 572, 615, 638–39, 641, 702–03). The present directors of CTI are all church members. Trinity Church is located in San Antonio and has six members of its Board of Elders, the governing body of the church (Tr. 639). It has a congregation of approximately 1,500 adults, 700–750 members, and a staff of 17 (CTI Exh. 3; Tr. 600–02). Trinity Church is a membership corporation (Tr. 771).

94. Trinity Church is providing the financial backing for CTI. The church has obtained a $1 million bank loan commitment for CTI, to be collateralized by a mortgage on church property located at 8750 Fourwinds Drive in San Antonio. Trinity Church will also make a direct loan to CTI of $50,000. Trinity Church will not require any collateral for its loan to CTI, nor will Trinity Church require repayment if it would adversely affect CTI (Tr. 657–58). Thus far, most of CTI's funds ($50,000–$100,000) have come directly from Trinity Church. The remainder of the funds have come from donations by individual members of Trinity Church (Tr. 657–59, 753–57, 771–72).

95. The members of the church vote on important matters that the church plans to undertake—in fact, frequently so (Tr. 739). Thus, the church's decision to mortgage its property for the $1 million bank loan to CTI and to loan $50,000 to the applicant (funds which have now amounted to $50,000 to $100,000) was taken following a presentation by Randolph in a meeting of the church members and a vote by that body (Tr. 659, 754).

[7] Because Ryan has withdrawn from CTI and will not be integrated, biographical data relating to her has not been included in the findings.

96. According to Hembree, the church committed itself to mortgage its property (Tr. 659):

> Because of the involvement of the church in the community. They felt that would be the best way to accomplish what they had in mind through something of that nature to endorse a christian television station within the city of San Antonio.

Hembree believes that CTI's "main goal" is to disseminate Christianity (Tr. 642–43).

97. Allen Randolph, CTI's president and a director, is senior pastor of Trinity Church, and the leader of its Board of Elders, the church's managing body (CTI Exh. 3; Tr. 572). Allen Randolph intends to continue to serve as pastor of Trinity Church in the event CTI is granted Channel 29, notwithstanding his plans to work full time as the station's general manager. CTI will not initially pay Mr. Randolph. Rather, he will continue to receive a salary from Trinity Church. According to Mr. Randolph, CTI's directors (not Trinity Church's) will determine if it is necessary for Trinity Church to continue to compensate him or whether such compensation should come from CTI (Tr. 573–74).

98. As noted, all of the current directors are members of Trinity Church. Indeed, Mrs. Ryan was employed by the church until recently as director of women's ministries (Tr. 615, 727–28). Moreover, all of the management employees initially proposed by CTI were church members; many were also church assistant pastors, staff members, or members of the church's Board of Elders (Tr. 633–38, 736, 741).

99. Officers and staff of Trinity Church continue to play a role in the management and operations of CTI. Asked about the relationship between CTI and Trinity Church, Allen Randolph responded: "I'm a major part of that relationship, sir, as having been pastor of Trinity Church and for the facilitating of much of this the staff that is available to me have been involved" (Tr. 587–88).

100. Richard McPherson, who was an incorporator and original director of CTI and was proposed for a management position, is associate pastor of Trinity Church, second in command behind Mr. Randolph (Tr. 585, 587–88, 605). Notwithstanding his withdrawal from CTI, he continues to perform services for CTI. Together with Allen Randolph, he negotiated and prepared the air-time contracts between CTI and various religious broadcasters that are a part of CTI's application (Tr. 585–87). Kathleen Ryan, on the other hand, has not participated at all in the negotiation of those contracts notwithstanding that she is a director of CTI and the station's proposed sales director (Tr. 743, 751; CTI Exh. 2). According to Mr. Randolph, "RicK McPherson participates in a great deal of things I do and has responsibility for those" (Tr. 587).

101. Beverly Hime, who is secretary/treasurer of Trinity Church, is one of only two people authorized to sign checks on CTI's

account. The other person is Allen Randolph. Ms. Hime, however, is not an officer, director, employee or proposed employee of CTI (Tr. 575, 657, 676, 745), Kathleen Ryan, who has been the treasurer of CTI since 1978, is not, on the other hand, authorized to sign checks for CTI. While she knew that CTI had a checking account, when asked at what bank she replied: "I realize being treasurer that may seem strange. I really don't know" (Tr. 748).

102. Although Mrs. Ryan was previously CTI's treasurer, she did not keep the corporation's books and records and is not authorized to sign checks on CTI's account. These jobs are performed by Beverly Hime, an officer and employee of Trinity Church, even though Mrs. Ryan does not recall the Board ever authorizing her to do so (Tr. 728, 747, 749–51).

103. According to Mr. Randolph, there is no understanding that Board members of CTI must work at the station (Tr. 576–79). However, both Mr. Hembree and Mrs. Ryan were originally told that all Board members were required to work at the station (Tr. 620–21, 639–40, 716, 730–31, 733). CTI, has, however, no requirement in its Articles of Incorporation or its By-laws requiring directors to work at CTI's proposed station (Tr. 576–79).

104. Besides its application for Channel 29, CTI has on file two applications for low power television stations in San Antonio on Channel 2 and 54 (CTI Exh. 1, p. 1). It has proposed to dispose of any licenses it receives for these facilities, but only if required to do so by the multiple ownership rules (*Id.*).

105. As specified in its amendment of May 15, 1981, CTI proposes to equip its transmitter site with an emergency power source. This would consist of a Caterpiller 500 kilowatt generator with a tank holding enough fuel for several days of operation. This generator would have sufficient power capacity to operate the transmitter at its full rated output. Thus, in the event of a power failure at the transmitter site, service to the public would not be interrupted.

United Television Broadcasting Corporation (United)

106. The applicant, United, is a Texas corporation, authorized to issue 5,000 shares of stock, each share of stock having one vote; 1,200 shares are issued and outstanding (United Exh. 1, p. 2). United is structured as follows (United Exh. 1, pp. 2, 3):

	Name and Resident	*Nature of Interest*	*Board of Directors*	*% of Ownership*
a)	Gene W. Schneider[8] Englewood, Colorado	Chairman of Board	Yes	—

[8] Gene W. Schneider is the president and member of Board of Directors of United Cable Television Corporation (United Exh. 2, p. 2).

	Name and Resident	*Nature of Interest*	*Board of Directors*	*% of Ownership*
b)	Bob A. Roth 207 Thelma Drive San Antonio, Texas	President	Yes	6.6%
c)	James M. Golden Englewood, Colorado	Secretary	Yes	—
d)	William J. Elsner Denver, Colorado	Treasurer	Yes	—
e)	Harold M. Scherr 606 Crestway San Antonio, Texas	—	Yes	6.6%
f)	Thomas E. Beatty Helotes, Texas	—	Yes	0.2%
g)	Herbert D. Kelleher 144 Thelma Drive San Antonio, Texas	—	—	6.6%
h)	United Cable Television Corporation Denver, Colorado	—	—	80%

107. When United filed its application on July 6, 1978, it did not specify the number of shares or ownership percentages held by the various San Antonio stockholders (Roth, Scherr, Beatty, and Kelleher). Instead it said that "[t]he precise percentage of each in this group is to be determined" (United Exh. 1). United's Exhibit 1 states:

> In the latter part of October 1981, it was tentatively agreed among the San Antonio group that the 20% (240 shares) held by that group will be allocated between them as follows: Messrs. Roth, Scherr and Kelleher, 6.6% each, and Mr. Beatty, 0.2% —total 20%. Inclusive of the date of this exhibit, United Television Broadcasting Corporation has not tendered with the Commission an amendment to its application (File No. BPCT-5248) specifying the within-referenced precise percentages of stock allocated among Messrs. Roth, Scherr, Kelleher and Beatty.

108. *Bob A. Roth* is the only principal of United proposed to be integrated into the operation of the proposed station on Channel 29 at San Antonio, Texas. Mr. Roth will be the general manager and devote full time to the operaion of the station (Tr. 808). His duties will include those general, supervisory aspects of all station operations, inclusive of finances, personnel, programming and public relations (United Exh. 4, p. 6). It was understood from the beginning that Mr. Roth would be the president and general manager, with responsibilities for the construction and operation of the station (Tr. 805).

109. *Harold M. Scherr* was born on April 10, 1923, in New Orleans, Louisiana. He resides at 606 Crestway, San Antonio, Texas (United Exh. 5, p. 2).

110. *Thomas E. Beatty*, a Black, was born on July 10, 1924, in Boston, Massachusetts. He presently resides with his family in an unincorporated suburb of San Antonio (United Exh. 6, p. 2).

111. *Herbert D. Kelleher* was born on March 12, 1931, in Camden, New Jersey (United Exh. 7, p. 2). He resides at 144 Thelma Drive, San Antonio, Texas (United Exh. 1, p. 2).

112. *Bob A. Roth* was born on July 17, 1922 in San Antonio, Texas. He attended public schools in San Antonio. Following high school, Mr. Roth entered Texas A & M University, majoring in Economics and Business in the School of Liberal Arts. He was called to active duty during World War II, serving in the South Pacific Theatre. After his discharge, Mr. Roth returned to Texas A & M University and obtained his degree in June 1946 (United Exh. 4, p. 2).

113. Mr. Roth entered the broadcast business in 1946 at Station KONO as a commissioned time salesman and soon became commercial manager of the station. In 1953, he received the Radio Advertising Bureau Outstanding Salesman Award. Thereafter, he started acquiring stock in Station KONO (Mission Broadcasting), a station built and organized by his father, Eugene J. Roth (United Exh. 4, p. 3).

114. At this time, television came along, and Mr. Roth organized a group of investors, including the Roth family, to apply for Channel 12 in San Antonio. A construction permit was granted to Mission Telecasting, in which Mr. Roth was president and commercial manager. The station began broadcasting in January 1957, as Station KONO-TV. In 1968, because of family illness, Mr. Roth negotiated the sale of Station KONO-TV to the Outlet Company, and his interest in KONO radio to his brother, Jack Roth (United Exh. 4, p. 4).

115. Mr. Roth is a member of the Board of the San Antonio Chamber of Commerce, and was a member of the Executive Committee for eleven consecutive years, holding the offices of treasurer, vice-president, and president during 1966–67 (United Exh. 4, p. 4). He was a founding member of the Board of the Ecumenical Center for Religion and Health from 1967–74. He served on the Board of Temple Beth-El (San Antonio Reform Jewish Synagogue) for several years, and served as president of the congregation from 1961–63 (United Exh. 4, p. 4).

116. In 1950, Mr. Roth served as president of the San Antonio Executive Association. He served as an Urban Renewal Commissioner for the City of San Antonio from 1966–73. He was vice chairman of the San Antonio Bicentennial Committee in 1973. He was a member of the Executive Committee of Hemisfair 1968, the World's

Fair in San Antonio. He was a member of the Board of Directors of United Way from 1952–58, and has been active to the present as chairman of various United Way campaign divisions. In 1958, Mr. Roth was chairman of the Citizens' Building Committee of the Northeast Independent School District (United Exh. 4, p. 5).

117. Mr. Roth has also served on several boards in San Antonio. In 1957–58, he was elected governor of the 10th district, Advertising Federation of America (United Exh. 4, p. 5).

118. Other professional offices that Bob Roth has held include: president of the San Antonio Advertising Club; member of the National Board of the Advertising Federation of America for two terms; vice chairman of the Council of Advertising Clubs; and vice-president of the Advertising Federation of America (United Exh. 4, p. 6).

119. Mr. Roth has received approximately five awards and honors including the General Federation of Women's Clubs Award to a Broadcaster for his Attitude of Responsibility and Service to the Community; the National Police Officers' Association award for the Improvement of Law Enforcement, resulting from an editorial on the Police Department; and a citation from the mayor of San Antonio in recognition of his services on the Committee for Desegregation (United Exh. 4, pp. 5,6).

120. United has no media interests other than the application (File No. BPCT-5248) for a construction permit for Channel 29 at San Antonio, Texas. No officer or director or stockholder of United has any ownership interest in any operational broadcast facility or related construction permit, newspaper or other publication, other than Bob A. Roth, who is a member of the Board of Directors and executive Committee and chairman-elect of Southwest Texas Public Broadcasting Council, licensee of educational television Stations KLRN, San Antonio, and KLRU-TV, Austin, Texas (United Exh. 3, p. 2).

121. The Board of Directors of Southwest Texas Public Broadcasting Council presently consists of 56 members, but is phasing down to an ultimate goal of 28 members (Tr. 802). Mr. Roth's interest in these educational stations is that of any public spirited citizen who wants to see these stations operate successfully (Tr. 801). As a member of the board and executive committee of the council, he wrestles with all of the problems evolving around raising the money to keep the stations on the air (Tr. 802). He does not manage the stations; there is a paid manager (Tr. 802). His term with the council expires on September 1, 1983, and he has no intention to seek or accept a further appointment (Tr. 821).

122. United Cable is a public corporation engaged primarily in the ownership and operation of cable systems throughout the United States. It owns and operates 37 systems serving communities in 16 states with over 450,000 subscribers (United Exh. 3). United owns

and operates the following cable systems in the State of Texas (United Exh.3-A):

Community	*No. Subscribers*
Abilene, Texas	24,970
Anson, Texas	(see Abilene, Texas)
Hamlin, Texas	(see Abilene, Texas)
Jacksonville, Texas	(see Tyler, Texas)
Perryton, Texas	2,983
Rotan, Texas	(see Abilene, Texas)
Sweetwater, Texas	6,605
Tyler, Texas	30,325

123. On January 5, 1982, United Cable Television Corporation and Buford Television, Inc. entered into a letter of intent entitling United Cable Television Corporation to acquire up to 80% interest in Home Entertainment Network, Inc. (HEN). HEN operates STV systems in the Cincinnati and Dayton, Ohio, and Chicago, Illinois television markets, and expects to commence an STV operation in the Minneapolis-St. Paul, Minnesota area during 1982 (United Exh. 3, pp. 2, 3). On February 12, 1982, the transaction was consummated, whereby United Cable Television Corporation acquired an 80% interest in HEN.

Financial Issue

124. The financial qualifications issue was specified against United Television Broadcasting Corporation because it failed to demonstrate that it had sufficient funds to meet $2,056,916 in estimated construction and operating costs for the first three months. The *Hearing Designation Order*, at paragraph 9, noted that United has relied on an $860,000 bank loan and other funds to be made available to it from its parent corporation. The bank letter did not comply with the requirements of FCC Form 301, Section III, page 3, Item 4(e), in that the letter did not specify the interest rate, repayment terms, or the collateral required. With respect to the funds to be provided by the parent, United submitted documentation that the parent had a $10,500,000 line of credit with a bank. However, it did not appear that the line of credit, or any portion of it, was earmarked for the proposed San Antonio station. Also, United did not submit a balance sheet for the parent which would be required since the line of credit was not earmarked. Finally, United did not submit a copy of the agreement by which the parent is obligated to provide funds. On October 30, 1981, United filed an amendment which set forth a revised financial plan. This amendment was accepted by Order of the Presiding Judge released November 20, 1981. This plan contemplates the lease of equipment

rather than purchase. Thus, United's first three months construction and operation costs would be reduced to $922,769.

125. By letter of October 28, 1981, United Cable Television Corporation (Cable), the parent of United, indicated its willingness to provide $1,000,000 in funds to United at its cost of obtaining such funds (United Exh. 8, p. 5). By letters of October 22, 1981 and November 19, 1981, the First National Bank of Boston indicated its willingness to loan Cable the sum of $1,000,000 which was earmarked for the use of the proposed San Antonio station. This letter further indicated that the funds would come from an existing $125,000,000 line of credit already established by Cable and that such loan would be subject to the customary terms and conditions (United Exh. 8, pp. 6, 7). Also, by letter of October 27, 1981, the Frost National Bank indicated its willingness to loan $200,000 collectively or individually to four of United's local stockholders. The letter clearly spelled out all of the terms and conditions of the proposed loan (United Exh. 8, p. 8). Moreover, Mr. Roth and the other three local stockholders had committed themselves to earmark the $200,000 loan for the proposed San Antonio station (Tr. 818–19). Finally, by letter of October 20, 1981, the Harris Corporation indicated its willingness to provide $1,750,000 in equipment with deferred payments. The letter clearly spelled out all the terms and conditions of the lease arrangement (United Exh. 8, p. 9). Moreover, these terms and conditions are consistent with United's revised financial plan.

Ultimate Findings and Conclusions

126. This proceeding involves four mutually exclusive applicants seeking a construction permit to build a new television station in San Antonio, Texas. With the exception of a financial issue specified against United Television Broadcasting Corporation, all applicants were found basically qualified. Because only basically qualified applicants are entitled to comparative consideration,[9] the financial issue directed against United will be considered and resolved before a comparative evaluation of the competing applicants will be undertaken.

Financial Issue Directed Against United

127. The financial issue was specified against United because of the failure of the applicant to demonstrate sufficient funds to meet anticipated expenses. Originally, the applicant estimated in excess of $2 million in construction and operating costs. As a result of an amendment, which proposes the lease rather than the purchase of

[9] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub nom. Guinan* v. *Federal Communications Commission*, 297 F.2d 782 (1961).

equipment, United's first three months construction and operation costs were reduced to $922,769.

128. United will meet its anticipated costs of construction and operation with a loan from its parent, United Cable Television Corporation, in the amount of $1,000,000. The parent will obtain the $1,000,000 to be made available to United from an existing line of credit in the total amount of $125,000,000. Also, United has $200,000 available from the four local San Antonio stockholders. It, thus, appears that United has demonstrated the availability of $1,200,000 to meet anticipated costs of $922,769 and is financially qualified.

Comparative Evaluation

129. The only basic qualifying issue has been resolved in favor of United and it is now necessary to comparatively evaluate the four applicants contesting for the construction permit at issue in this proceeding. Such evaluation is governed by the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. In that statement, the Commission indicated that there are two primary objectives toward which the process of comparison should be directed: (1) the best practical service to the public; and (2) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

130. In the landmark case of *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court set as a First Amendment objective the maximum possible diffusion of communications facilities. In its *1965 Policy Statement*, the Commission describes diversification of control of the media of mass communications as, "a factor of primary significance". *Id.* at 394. Neither Las Misiones nor any of its principals have any media interests. The same can be said for CTI.[10] Alamo itself has no other media interests, but Paris and Sherry Schindler have several media interests. Specifically, Paris Schindler is 16% owner, vice-president, and director of Fayette Broadcasting Corporation, licensee of KVLG and KMUZ(FM), La Grange, Texas and 15% owner, vice-president and director of Ozark Television Co., KLMN(TV), Fort Smith, Arkansas. He is also 5% owner, a vice-president and director, in Dogwood Broadcasting Corp., permittee of Channel 19, Nacagdoches, Texas and Sage Broadcasting Corp., permittee of Channel 6 in San Angelo, Texas. Sherry Schindler has interests similar to her brother in Fayette Broadcasting Corp. and Ozark Television Co. In the event the construction permit is granted to Alamo, Paris and Sherry Schindler will divest

[10] Mr. Randolph was, until mid January 1982, a director of Friendly Bible Church, Inc. On January 1, 1982, Friendly Bible Church, Inc. acquired an access channel on a CATV system serving San Jose, California (Tr. 568). This interest is not of sufficient magnitude to enter into the comparative aspects of this case.

their interests in and resign all positions with the above-referenced companies, prior to the issuance of program test authority. Another of Alamo's stockholders also has a media interest. Specifically, Reynaldo Lopez owns less than 1% of the stock in a corporation which in turn owns 51% of Nuestro Publications, Inc., publisher of *Nuestro Magazine*. The magazine is published ten times a year out of New York City and is oriented toward a Hispanic audience. Because Lopez's interest in this magazine is remote and *de minimis* in nature, it will not be given weight as a comparative factor in this proceeding.

131. CTI argues that the Schindlers should not be credited with their commitment to divest and that Alamo should be charged with their media interests under the diversification criteria. It is CTI's position that under *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (1978), *aff'd* 86 FCC 2d 423 (1981), a commitment to divest must, *inter alia*, involve a sale to the majority stockholder, promptly upon grant, and such divestment must be a *sine qua non* of financial qualifications. CTI argues that Alamo has not met these conditions and therefore the Schindlers' commitment to divest should not be credited.

132. The Presiding Judge is unpersuaded by the arguments advanced by CTI. In a recent decision, the Review Board fully credited an unequivocal commitment to divest prior to licensing of the new station made by an applicant before designation. *WHW Enterprises, Inc.*, 89 FCC 2d 799 (1982). Here, the Schindlers, prior to the time this case was comparatively "frozen", unequivocally committed themselves to divest their minority broadcast interests in the event of a grant of the Alamo application with such divestiture occurring prior to program test authority.[11] This is sufficient under the Review Board's decision in *WHW Enterprises, Inc.*, cited *supra*, to eliminate from comparative consideration the minority broadcast interests of Paris and Sherry Schindler and CTI's arguments to the contrary are rejected.

133. United is 80% owned by United Cable Television Corporation (United Cable). United Cable owns and operates 37 CATV systems in 16 states which provide service to 450,000 subscribers. Included among United Cable's systems are eight wholly owned systems in Texas that provide service to approximately 65,000 subscribers. In addition, United Cable recently acquired 80% of Home Entertainment Network (HEN) which operates STV systems in the Cincinnati and Dayton, Ohio and Chicago, Illinois television markets and expects to begin an STV operation in the Minneapolis-St. Paul, Minnesota area during 1982. These extensive CATV and STV interests cannot be considered trivial. See *Alexander S. Klein, Jr.*, 86 FCC 2d 423. Such interests place United behind the other

[11] Alamo suggests that divestiture may be made a condition of the grant of the Alamo application.

applicants under the diversification criteria of the comparative issue.[12]

Integration

134. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra*, at 395. Full-time, or almost full-time participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

United

135. Of the four applicants, United proposes the least amount of integration. It proposes to integrate Mr. Roth into the management of its station as the full time general manager. Roth is also an officer and director of United. The difficulty with this proposal is that no precise ownership interest in United was assigned to Mr. Roth prior to the time the comparative cases were frozen. While Mr. Roth is represented to have a 6.6% interest, such interest was not revealed until the exhibits were exchanged and even then it was merely stated that such ownership interest resulted from a "tentative agreement." Indeed, no amendment to the application has ever been filed to reflect the precise ownership interest of Mr. Roth in United.[13] Under these circumstances, United cannot be credited with 6.6% integration credit for Mr. Roth. Such ownership interest for Roth was never reflected in the application, perhaps because it may still be only tentative, and to award ownership and integration credit on the basis of a "tentative agreement" which may or may not

[12] This is more so because United's only integrated stockholder, Mr. Roth, who is an officer and director of United, is also a member of the board of directors and executive committee and chairman-elect of Southwest Texas Public Broadcasting Council, licensee of educational television stations KLRN, San Antonio, and KLRU-TV, Austin, Texas.

[13] Because Roth was proposed as the full time general manager, his precise degree of ownership was a decisionally significant matter. Thus, when his ownership interest was firmed up, an amendment should have been filled.

fix actual ownership would be unfair and prejudicial to the other applicants and unjustified. In any event, even if United was credited with the 6.6% full time integration of Roth as general manager, United would still not be a serious contender for the construction permit at issue in this proceeding under the Commission's comparative criteria because its integration is lower than the other applicants and it has other significant media interests which places it last under the diversification criteria.[14]

Las Misiones

136. Las Misiones proposes to integrate Dr. San Martin into the ownership and management of the station as full time general manager. Dr. Martin is president, director and 12.5% stockholder in Las Misiones. He and the nine other stockholders in Las Misiones are Hispanic-Americans and all are local residents, many of long duration. The integration credit of Dr. Martin is further enhanced because of his long time local residence, his active and long time involvement in local civic activities and organizations in significant capacities and his past broadcast experience. His background, which includes numerous awards for community service, adds great strength to the Las Misiones application. Also, Las Misiones is entitled to some merit for the participation of its eight directors on the Program Policy Committee, not under integration, but because the directors will devote some time to station affairs and this represents minority participation in a broadcast station. See *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1496 (1979).[15]

137. Las Misiones argues that it should be the preferred applicant in this proceeding. In support of this position, Las Misiones states that San Antonio has a 53.5% Hispanic population; that all its stockholders are locally-resident Hispanic-Americans; that significance should be given to minority control *per se*, a criterion the Commission has established in low power cases and for "clear" AM channel filings; that Las Misiones' 100% Hispanic ownership is entitled to a "conclusive preference";[16] that Las Misiones' application should be preferred because its 100% minority-owned proposal would "affirmatively promote diversification".

138. Las Misiones candidly admits that the position it is urging

[14] Mr. Roth, because of his past broadcast experience and long and distinguished service in various organizations in San Antonio, brings great strength to United's application. However, such factors clearly do not overcome the matters previously considered in evaluating United's comparative standing.

[15] It is proposed that the directors will devote 1 day per week, an insufficient amount of time to merit integration credit. See *Midwest Broadcasting Company*, cited *supra*.

[16] Las Misiones argues that it should not here receive less of a preference then it would receive if it applied for a low power station or a previously clear AM channel.

is contrary to Commission policy set forth in *WPIX, Inc.*, 68 FCC 2d 381, 411 (1978) and *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981), that minority ownership-participation should be regarded as a qualitative aspect of integration. However, it is Las Misiones' position that these cases are no longer good law, particularly in light of the Commission's emphasis on minority ownership as expressed in the *Report & Order* in the low power rulemaking proceeding[17] and the AM clear channel proceeding.[18]

139. The position advocated by Las Misiones cannot be adopted. What Las Misiones overlooks is that *WPIX, Inc.* and *Alexander S. Klein, Jr.* have been uniformly followed by the Review Board in recent cases dealing with minority ownership and participation and there is no justification for the Presiding Judge to ignore those cases simply because Las Misiones believes they are no longer good law. Indeed, in *New Continental Broadcasting Co.*, 88 FCC 2d 830 (1981), *recon. denied*; 51 RR 2d 266 (1982), the Review Board rejected arguments quite similar to those advanced here by Las Misiones. Specifically, the Board rejected an argument that an applicant should receive special credit for minority ownership proportionately related to the ethnic composition of the community, 88 FCC 2d 845, n. 17. Thus, Las Misiones is not entitled to special credit because of the high percentage of Hispanics in San Antonio. The Review Board emphasized that "the relevant consideration is not minority ownership *per se*, but rather the extent to which minority owners are integrated into the proposed station's operation".[19] In line with *WPIX, Inc.*, cited *supra*, minority ownership is a factor which qualitatively enhances an integration proposal. *Bradley, Hand and Triplett*, 51 RR 2d 383, 387 (Rev. Bd. 1982). The Presiding Judge is not at liberty to change well established Commission policy on the basis of the arguments advanced by Las Misiones. Clearly minority participation enhances an integration proposal. But where a large difference in the degree of quantitative full time integration exists, qualitative attributes alone cannot overcome quantitative differences. *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (1981); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (1980). As will be shown, there is a large difference in Las Misiones' integration proposal (12.5% full time) as compared to one or more of the other applicants. Even when Las Misiones is given full qualitative enhancement credit, it still cannot overcome the large difference in quantitative

[17] *Report & Order* in BC Docket 78–253, an *Inquiry into the Future Role of Low Power Television Broadcasting*, FCC 80–107 (released April 26, 1982).

[18] *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345 (1980) *aff'd sub nom Loyole University* v. *FCC*, 80–1824 (D.C. Cir., Jan. 26, 1982).

[19] 88 FCC 2d at 844.

integration existing between its application and one or more of the other applicants.

CTI

140. CTI has undergone a substantial change since completion of the hearing. While CTI argues that it is entitled to 100% integration credit, according to the Review Board's decision in *New Continental Broadcasting Company*, cited *supra*, such credit cannot exceed 66 2/3%. Even more important perhaps, is the argument by the other applicants that CTI is entitled to virtually no integration credit. These matters must be considered in order to properly evaluate the integration credit to which CTI is properly entitled.

141. CTI has proposed to integrate its three directors as full time managerial employees: Allen Randolph, Elmer Hembree and Kathleen Ryan. This was the proposal put forth at the hearing. Thereafter, Kathleen Ryan, who testified as to her commitment to CTI on January 29, 1982, resigned both as a director and an employee on February 9, 1982. Thus, in keeping with the Review Board's decision in *New Continental Broadcasting Company*, cited *supra*, CTI can, at most, be credited with only 66 2/3% integration and CTI's claim of 100% integration credit on the basis of a reconstituted Delaware corporation with only two directors is rejected.[20]

142. It is clear from the foregoing that CTI's claim for integration credit is predicated on its argument that the directors of CTI are the sole "owners" of the applicant for purposes of assigning integration credit. However, the *de jure* aspects of CTI's corporate organization cannot be blindly accepted at face value. In line with *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (1977),[21] an

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[20] See *Memorandum Opinion and Order* of the Presiding Judge released May 3, 1982 accepting CTI's amendment reporting the resignation of Ryan and the reconstitution of CTI as a Delaware, rather than a Texas corporation. Such amendment was accepted for Section 1.65 purposes only.

[21] In *Henderson Broadcasting Co., Inc.*, one of the applicants, BMC, had two classes of stock, Class A (non-voting) and Class B (voting), and two stock-holders, Rogers and Hilgenberg. Hilgenberg was the proposed general manager; Rogers was not to be integrated. After all subscribed shares had been issued, Hilgenberg was to own all of the Class B voting stock, 25 shares and 1 share of Class A non-voting stock. Rogers would own 450 shares of Class A non-voting stock, and no voting stock. BMC argued for 100% integration credit on the basis of Hilgenberg's ownership of all of the voting stock. The Administrative Law Judge credited BMC with only 5.46% integration, which was Hilgenberg's interest in the corporation if the voting and non-voting stock were combined. The Judge rejected BMC's 100% integration argument, concluding that Rogers controlled BMC. Of critical significance, the Judge found, was that Rogers was virtually the sole financial investor and the only one authorized to draw upon BMC's bank account. "Thus, he ha[d] complete control of the purse strings of the applicant, and through this means [would] have complete veto power over Mr. Hilgenberg's action as proposed general manager". The Review Board agreed with the Judge's analysis

examination of the relationship between CTI and Trinity Church must be undertaken to determine whether, for integration purposes, CTI can be considered an entity separate and distinct from the church itself with its "ownership" limited to its directors. While CTI may be a separate legal entity, the findings discussed below firmly supports the conclusion that CTI is, in reality, nothing more than the broadcasting subsidiary of Trinity Church and CTI and Trinity Church must be treated as one and the same for evaluating and assigning integration credit.

143. CTI was organized in 1978 by members of the Board of Elders of Trinity Assembly Church of San Antonio. The purposes and objectives of Trinity Church and CTI are the same. Originally a member corporation, CTI was changed to a non-member corporation expressly on the advice of its Washington communications counsel. The church and CTI have the same address. The pastor of Trinity Church is the president of CTI and the proposed general manager of the station. All directors of CTI are members of Trinity Church. The church has made between $50,000 and $100,000 available to CTI for its application and has agreed to make church property available as collateral for a $1 million bank loan to finance construction and

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and applauded the refusal to accept the mechanical and automatic *de jure* evaluation of ownership urged by BMC in the determination of the credit which should be accorded BMC on the integration criterion. But the Board concluded, using an "alternative approach", that Rogers should be considered the sole owner of BMC and that BMC should be accorded no integration credit.

As a basis for its analysis, the Board explained:

> there is a well-established principle of law, known as the corporate fiction - alter ego doctrine, that all *de jure* aspects of a corporate organization must be disregarded when failure to do so would enable the corporate device, particularly in an administrative proceeding, to circumvent the public interest, cause unfairness, or perpetrate inequities, and that in such circumstances the stockholders may be treated as if the corporation did not exist.

The Board stated that "venality does not constitute a prerequisite to invoke the corporate fiction - alter ego doctrine". Rather, the Board held that there are "two sole prerequisites":

(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and

(2) that if the *de jure* aspects of the corporation are deemed controlling, there would be a circumvention of the public interest, or there would result inequities or unfairness.

Thus, the Board held:

> It therefore necessarily follows that acceptance of BMC's proposition - resulting in a 100% integration credit to BMC or, indeed, in any significant credit - would make a mockery of the underlying objective of the integration criterion. It would also result in unfairness to the other applicants in this proceeding, and it would frustrate all other comparative proceedings by encouraging other applicants to follow this same facade.

operation of the station. These financial undertakings by the church were authorized by the membership of Trinity Church. The funds that have come to CTI have been made available by Trinity Church itself or members of Trinity Church. Significantly, the funds of CTI are controlled by officers of the church, not CTI. For example, the only two people who can sign checks for CTI are Allen Randolph, the pastor of Trinity Church (and president of CTI) and Beverly Hime, the secretary/treasurer of Trinity Church. Beverly Hime is not an officer, director or employee of CTI. On the other hand, the treasurer and a director of CTI, Mrs. Ryan, had no authority to sign checks and in fact did not even know in what bank CTI maintained its checking account. Richard McPherson, employed as associate pastor of Trinity Church and one of the incorporators and original directors of CTI before he withdrew when it was realized that his Canadian citizenship would prevent a grant of a construction permit, continues to perform services for CTI although he has no official connection with CTI. Reverend Randolph, while he is proposed for full time integration by CTI as general manager, will continue to be paid only by Trinity Church.

144. These factors demonstrate the interrelationship between CTI and Trinity Church. Clearly, the church has full control of CTI's purse strings and has exercised, through Reverend Randolph and other church members, a pervasive influence over virtually all aspects of CTI's activities. There is a unity of interest and ownership between Trinity Church and CTI. Under these circumstances, to evaluate CTI's integration credit by limiting its "ownership" solely to its directors would elevate form over substance and thwart a proper and meaningful evaluation. Indeed, in evaluating the integration credit to be assigned, CTI and Trinity Church must be considered one and the same.

145. Having reached the conclusion that for integration purposes CTI and Trinity Church must be considered one and the same, it is now necessary to attempt to assign integration credit based on such conclusion. One of two approaches can be taken. First, it can be said that for integration purposes, the true "owners" of CTI are the members of Trinity Church. Because Trinity Church has between 700–750 members, it would appear that the proposal to integrate only Randolph and Hembree would result in minute integration credit for CTI. Another approach would be to consider the Board of Elders of Trinity Church, the church's governing body, as the true "owners" of CTI for integration purposes. Under this analysis, because there are at least six members of the Board of Elders and only one[22] (Reverend Randolph) is proposed to be integrated, CTI is entitled to, at most, 16.66% integration credit. CTI disagrees with all

[22] Hembree, while a member of the church, is not presently a member of the Board of Elders.

this and argues that such type evaluations are improper because no real party in interest issue was sought or added. But these findings and conclusions are not being made to disqualify CTI under an unspecified real party in interest issue. They are being made to reasonably and fairly evaluate CTI's integration credit under the comparative issue. Significantly, there was no real party in interest issue in *Henderson* where a somewhat similar analysis was undertaken under the comparative issue. It would be simply unfair and prejudicial to other applicants to allow Trinity Church, or similar type organizations, to structure applications in such a way as to create the illusion of 100% integration credit and not permit full exploration of such claim in order to expose the artificiality of the proposal.

146. Based on the foregoing, CTI is entitled to, at most, only 16.66% integration credit for its proposal to integrate Randolph as general manager.[23] Such proposal is enhanced because Randolph resides within the proposed station's service contours and he has served on the Board of Directors of two local civic organizations. CTI also receives a slight preference for proposing auxiliary power.

Alamo

147. Thus far, no more than 16.66% integration credit can be assigned to any of the applicants previously considered. Because Alamo, as discussed below, proposes 99% integration, unless virtually all of its integration proposal is discredited, the other applicants stand well behind Alamo on quantitative integration.

148. Alamo proposes to integrate all its stockholders full time in the operation of the station in various management capacities. Paris Schindler, a 45% stockholder, will be general manager; Sherry Schindler, his sister and a 30% stockholder, will be program manager; Phyllis Davis, a 15% stockholder, will be assistant general manager and women's news director; Reynaldo H. Lopez, a 2% stockholder and an Hispanic, will be business manager; James Myart, a 3% stockholder and a Black American, will be promotion

[23] An issue has been raised whether the proposal of Randolph to serve as general manager is at variance with the proposal in the application that he will serve as program director. Generally, an applicant may not proffer evidence at the hearing that is contrary to or inconsistent with information previously submitted in the application. *Muncie Broadcasting Co.*, 51 RR 2d 46 (1982). Here, there was no statement in the CTI application as to who would serve as general manager. The application was silent on this point. Thus, the proposal that Randolph would be the general manager (in addition to program director) is not inconsistent with or contrary to information in the application and does not constitute a variance. *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (1982). It was the intention of Randolph from the inception to serve as general manager (Tr. 591–92; 663–64). His proposal, however to be program director does not appear to be of an enduring nature because it is represented that an experienced program director will be hired "as soon as feasible". In any event, Randolph will receive integration credit for being the general manager and such credit would not be significantly enhanced even if he received credit for also being the program director.

manager; Joe Long, a 2% stockholder and a Black American, will be community and cultural affairs director; and Frank Collins, a 2% stockholder and a Black American, will be news manager. On the basis of the proposal, Alamo, as noted, claims 99% integration credit.[24] This claim, however, is assailed by the other applicants on various grounds.

149. No applicant has advanced a persuasive argument for discounting or discrediting the integration proposal of Paris Schindler.[25] He will be the full time general manager of the station, and, together with his sister, is mainly responsible for financing construction and operation of the station. His 45% integration credit as general manager is entitled only to slight enhancement credit for his pledge to move to San Antonio. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 430 n. 33 (1981). Because he has no past broadcast experience or participation in San Antonio civic organizations, no further enhancement credit is warranted.

150. The other applicants argue that Alamo should not be credited with Sherry Schindler's integration proposal. In support of this, it is argued that she has not been assigned specific duties; that she is merely a "nominal" principal and is dominated by her brother, Paris Schindler; that she has not been actively involved in Alamo and she shouldn't be considered a "true and actual" owner. The Presiding Judge finds these arguments unpersuasive. Sherry Schindler will be the program director, a management position, and she testified regarding the duties she will perform at the station (Tr. 209–12; 259–60). Thus, the argument that no specific duties have been assigned has no merit. Moreover, although she looks to her brother for advice and guidance with respect to Alamo's application, there is no evidence to support a conclusion that Sherry Schindler is not an actual owner or is only a nominal principal. She is paying her pro rata share of the expenses in prosecuting the application; she is not dependent on her brother; she owns and operates a successful business in Houston; and she has committed herself to work full time at the station as program director. The fact that she played no role in recruiting the minorities does not discredit her integration proposal or demonstrate in any way that she is not the actual owner of her stock. Her brother is the single largest stockholder in Alamo and it is understandable that he would assume most of the burdens regarding

[24] A 1% stockholder withdrew. Thus, only 99% integration credit is claimed by Alamo.

[25] CTI does not question such credit. However, Las Misiones argues that the manner in which the minorities were added to the Alamo application requires the imposition of a comparative demerit sufficient to wipe out all of the 45% integration credit claimed for Paris Schindler. This argument lacks merit, but will be discussed *infra*. Also, United argues that Paris Schindler's duties have not been specified. This is erroneous because Paris Schindler will be the general manager of the proposed station, a management position entitled to particular weight. *Grand Broadcasting Co.*, 36 FCC 925 (1964).

the application. There is no reasonable basis to discredit her integration proposal and the other applicants attempt to do so is unsupported. Thus, Alamo will be credited with Sherry Schindler's 30% integration proposal. Such proposal is slightly enhanced because Ms. Schindler is a woman and she has pledged to move to San Antonio.

151. Alamo's claimed credit for the proposal to integrate Mrs. Davis is also attacked. In this connection, it is argued that Mrs. Davis is merely a nominal owner and that her husband, Herbert Davis, is the true and actual owner. This claim is made primarily because Herbert Davis was instrumental in preparing and filing the Alamo application; he remains the local attorney for Alamo and attends meetings; Mrs. Davis' interest in Alamo has been derived from her husband; and Mrs. Davis is paying less for her stock than other stockholders. Originally, Mr. Davis owned the interest in Alamo now held by Mrs. Davis. But Mrs. Davis' interest in Alamo was transferred to Mrs. Davis before the comparative cases were frozen. There is no evidence that such transfer was a sham and that Mr. Davis is still the true owner. Indeed, it was the intention of the parties that Mr. Davis' interest would be transferred to Mrs. Davis and since then Mrs. Davis has been the true and actual owner of the stock and there is no evidence to the contrary. The arguments advanced by the other applicants to support the claim that Mrs. Davis is not the true and actual owner are predicated on speculation, and lacking in factual support. There is simply no reasonable basis for discrediting the integration proposal of Mrs. Davis. Thus, Alamo will be credited with 15% full time integration credit for Mrs. Davis as proposed assistant general manager and women's news director. Such credit is enhanced because Mrs. Davis is a woman, is a local resident, and has been involved in several local organizations.

152. As already noted, Alamo also proposes to integrate Lopez, Long, and Collins, each 2% stockholders, and Myart a 3% stockholder (hereinafter called minorities). However, questions have been raised regarding whether such proposals should be credited.[26] It is argued that the minorities are "window-dressing"; that their addition to the Alamo application and their limited interest represents "tokenism"; that they are merely "surrogates" of the Schindlers, the "money people"; that they have not "shaped" the Alamo application, have no meaningful financial commitment to Alamo,[27] and, despite their titles, they do not have any "important roles in management".[28]

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[26] CTI does not question the integration credit although it argues that such credit should be slight.

[27] The minorities are purchasing their stock interest with bank loans arranged for and guaranteed by Paris Schindler.

[28] The other applicants question Lopez and Myart's integration proposal because

153. It appears clear that the minorities were recruited to add comparative strength to the Alamo application. Alamo did, of course, have the right to upgrade its application in good faith prior to the cut-off date. *Alexander S. Klein, Jr.*, cited *supra*. The arguments raised by the other applicants raise interesting and troublesome issues. Fortunately, in the context of this case, it is not necessary to consider the question of how much integration credit Alamo should receive for the proposal to integrate the minorities. Even if the minority integration proposal was given no credit at all, Alamo would still have 90% integration credit, far more than any other applicant in this proceeding. Indeed, it would appear that Paris Schindler's 45% full time integration proposal as general manager is quantitatively so far superior to the other applicants as to be sufficient, in and of itself, to carry the day for Alamo in this proceeding. For these reasons, it is not necessary in the context of this case to address the arguments regarding minority integration credit raised by the other parties, which, the Commission characterized as "troublesome" in *Alexander S. Klein, Jr.*, cited *supra*.

154. One argument raised by Las Misiones must, however, be addressed. As noted earlier, Las Misiones argues that Paris Schindler should receive no integration credit because of his "cynical attempt to utilize minority stockholders as window-dressing". It would seem, however, that even if the claim of "window-dressing" or "tokenism" had merit, the correct way to deal with it would be to deny integration credit for the claimed "token" integration. There is no showing here that Paris Schindler lacked good faith in adding the minorities to Alamo's application. Those minorities recognized their limited stock interest. The fact that Paris Schindler arranged for and guaranteed the bank loans to enable the minorities to purchase their stock is not something that should be criticized.[29] It has long been recognized by the Commission that a lack of financing has been a formidable obstacle to minority ownership and participation in broadcasting.[30] Paris Schindler, by financially underwriting the purchase of stock by the minorities, has given these young minorities a stake in a television broadcast station which they would otherwise not have. Even if that stake is small, individually or collectively, it is

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three months after they became committed to Alamo, they became involved in an application for a station in Lockhart, Texas, in which they represented, *inter alia*, that they would be integrated in the operation of the Lockhart station. Moreover, Las Misiones questions the definiteness of Lopez's integration proposal because of his own testimony (see Tr. 360-61). If this case was close enough to turn on the validity of the minority stockholders' integration proposals (which it is not), further consideration to the arguments of the parties regarding these proposals would be warranted and necessary.

[29] The Commission has credited minority ownership and integration even where the stock interest was awarded as a gift. See *Alexander S. Klein, Jr.*, cited *supra*.

[30] See for example, *Financial Qualifications Standard for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978).

still better than nothing. While the addition of the minorities was designed to enhance the comparative posture of the Alamo application, the characterization of this action as "cynical" is unsupported. There is simply no support or justification in fact or law for penalizing Alamo by stripping it of all the integration credit it receives by virtue of Paris Schindler's full time integration as general manager.

155. In summary, the following ranking of the four applicants under the Commission's comparative criteria is warranted. United is last. It has other cognizable media interests and has proposed virtually no integration. It is a clear loser. Las Misiones and CTI have no cognizable media interests; Las Misiones has 12.5% full time integration and CTI has been credited with 16.66% full time integration. The Presiding Judge would rank Las Misiones ahead of CTI because of qualitative factors. Specifically, the Las Misiones application is enhanced because of the full time minority integration of Dr. San Martin. Also, Dr. San Martin is a long time local resident of San Antonio with an exemplary record of civic participation in leadership capacities in various organizations for which he has been recognized and honored. His full time participation adds great strength to the Las Misiones application. Such enhancement credit (plus the merit Las Misiones receives because of the minority participation of its directors) is sufficient to overcome the small (4.1%) difference in quantitative integration and slight preference CTI has received for proposing auxiliary power. Alamo, with no cognizable media interests,[31] and its quantiatively superior full time integration proposal of at least 90%, is preferred under the integration criteria, i.e. best practical service. While qualitative factors elevate Las Misiones' application over CTI's, such factors clearly cannot bridge the wide gap between 12.5% full time integration and 90% full time integration. *Scott & Davis Enterprises, Inc.*, cited *supra*. Thus, Alamo receives a substantial preference under integration and is equal with CTI and Las Misiones under diversification. In keeping with the Commission's comparative policy statement, Alamo is the preferred applicant and a grant of its application will best serve the public interest.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Alamo Broadcasting Corporation for a construction permit for a new television station in San Antonio, Texas, IS GRANTED and the competing applications of Las Misiones

[31] Alamo is unequivocally committed to divest the media interest of Paris and Sherry Schindler before program test authority.

De Bejar Television Co., Christian Tele-Communications, Inc., and United Television Broadcasting Corporation, ARE DENIED;[32]

IT IS FURTHER ORDERED that the construction permit granted to Alamo Broadcasting Corporation is subject to the following condition:

Prior to construction of the TV tower authorized herein, permittee shall notify AM Station WOAI so that that station may determine operating power by the indirect method. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the aforementioned AM station. Subsequent to construction of the TV tower and installation of all appurtenances thereon, antenna impedance measurements of the AM antenna shall be made and sufficient field strength measurements obtained at at least 10 locations along each of eight equally spaced radials shall be made to establish that the AM radiation pattern is essentially omnidirectional and, the results submitted to the Commission in application for the AM station to return to the direct method of power determination. Thereafter the TV station may commence *Limited Program Tests.*

JOSEPH STIRMER *Administrative Law Judge*

FEDERAL COMMUNICATIONS COMMISSION

[32] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Service, Resale and Shared Use
Wide Area Telephone Service

Petition for declaratory ruling granted. BSOCs cannot invoke state tariff restrictions to prevent resale or sharing of intrastate WATS to terminate interstate communications. WATS between points within a state is interstate service when used to complete interstate calls, and as such is subject to FCC's policy favoring unrestricted resale and sharing of interstate public switched network services.

–Market Structure (Phase I)
CC Docket No. 78–72

FCC 82–579

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS and WATS Market Structure	CC Docket No. 78–72, Phase I

THIRD REPORT AND ORDER

(Adopted December 22, 1982; Released February 28, 1983)

BY THE COMMISSION: COMMISSIONERS QUELLO, FOGARTY, DAWSON, RIVERA AND SHARP ISSUING SEPARATE STATEMENTS; COMMISSIONER JONES CONCURRING AND DISSENTING IN PART AND ISSUING A SEPARATE STATEMENT.

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I. *INTRODUCTION*

A. *Outline of the Plan*

1. When this Commission initiated this proceeding to determine an optimal market structure for the MTS-WATS market, we concluded that it would also be necessary to prescribe the compensation that exchange carriers should receive for the origination or termination of all interstate and international services of all carriers. We recognized that it would be impossible to determine

"access" compensation for services of carriers that compete with MTS or WATS without correcting existing disparities in access compensation among services offered by AT&T and its telephone company partners.

2. We subsequently invited comments upon a tentative plan for carrier's carrier access charges that would allocate exchange plant costs among four service categories on the basis of relative use. We hoped that such a plan would eliminate discrimination or preferences in rates that were charged to end users of all services that we regulate. Comments in this and other proceedings and other developments led us to conclude that the tentative plan would not produce a correct solution to the discrimination problem. The recovery of fixed costs through usage charges produces discrimination among MTS users that is a primary cause of the inter-service disparities. The comments in this proceeding reveal a fairly broad consensus that this is the case.

3. We have accordingly concluded that a substantial portion of fixed exchange plant costs that are assigned to interstate services should ultimately be recovered through flat per line charges that are assessed upon end users. We are adopting access charge computation rules that will accomplish that result.[1] Those rules incorporate exceptions for pay telephones, the portion of a local dial switch that is sometimes described as non-traffic sensitive, and "private line" facilities used for services that are not close substitutes for MTS. Certain other fixed costs assigned to interstate services for customer premises equipment, inside wiring, and a Universal Service Fund will not be recovered through end user charges and will continue to be recovered through carrier's carrier charges. The Universal Service Fund will be designed to preserve universal service by enabling high cost local exchange companies to establish local exchange rates that do not substantially exceed local exchange rates charged by other local exchange companies.

4. A transitional plan is necessary for several reasons. Immediate recovery of high fixed costs through flat end user charges might cause a significant number of local exchange service subscribers to cancel local exchange service despite the existence of a Universal Service Fund. Such a result would not be consistent with the goals of the Communications Act. Some transitional adjustments are also necessary to avoid anomalous effects of existing disparities in interstate costs in different areas and to establish access charges for competing carriers that reflect existing inequalities in the quality of access arrangements. The transitional plan will also enable us to

[1] The rules are contained in Appendix A. Appendices B and D list persons who filed comments in response to the *Second* and *Fourth Supplemental Notices*. Appendices C and E contain summaries of those comments. Appendix F contains supplemental information with respect to the "bypass" phenomenon and Appendix G contains supplemental information with respect to the universality of service.

adjust rules in the future if unexpected developments demonstrate that changes are warranted.

5. This combination of factors has led us to adopt rules that incorporate two transitions. Some fixed costs in addition to any high cost or Universal Service Fund costs will be recovered through carrier's carrier charges during a 5-year transition period. A substantial portion of those costs will initially be assessed to AT&T as a charge for premium access. The remaining costs will be assessed to end users and will be recovered through a combination of usage and flat charges during a 7-year transition period. Before the end of the fifth year of the 7-year transition, we will evaluate the rules and policies adopted in this *Report and Order* and, if necessary, will make adjustments needed to promote the expressed goals of this proceeding. A minimum charge will be assessed upon all end users. The remainder of the costs may be recovered through usage charges until the usage charge for any line equals a cap or maximum. We are giving the exchange carriers considerable discretion to devise a combination of minimum, usage and maximum charges. This will give the carriers discretion as to how rapidly to phase in flat charges. It will enable carriers to respond quickly to any bypass threat where this a problem, while allowing for a more gradual phase-in where it is not. We are, however, imposing some limits upon carrier discretion. A minimum charge cannot be less than $2 per month for residential customers and $4 per month for business customers and the business minimum cannot exceed 200% of the residential minimum. Maximum charges will assure that customers do not pay more through end user charges for interstate use of a line that is used for local exchange and interstate services than they would pay for a line that is dedicated to a particular interstate service.

6. We are also prescribing rules for the computation of carrier's carrier charges for access services other than exchange plant. Although the tentative plan we described in 1980 would have limited the definition of access to facilities that are used in common by exchange and interexchange services, we have expanded the definition of access to correspond with the *Modified Final Judgment* in the AT&T antitrust case.[2] We have established nine different elements for such carrier's carrier changes and are prescribing rules for the computation of each element charge that are tailored to the nature of each service. We have established two elements for the use of local dial switches, three elements for operator services, and two elements for other switching and transmission facilities. We have also established a Billing and Collection element and a Special Access

[2] *See* Modified Final Judgment in United States v. American Telephone and Telegraph Co., Civil Nos. 74–1698 and 82–0192,—F.Supp.—, 47 Fed. Reg. 40, 392 (D.D.C. 1982). (hereinafter "MFJ").

element that consists primarily of the use of a variety of "private line" facilities.

7. We have decided that we should neither compel all exchange carriers to join in pooled uniform charges for all access elements nor permit unrestricted deaveraging. We are mandating the creation of an exchange carrier association that will collect and distribute the carrier's carrier portion of the non-traffic sensitive charges and file tariffs and administer revenue pools for companies that choose to join in the association's common tariffs for other access elements.

8. We are directing AT&T to prepare the initial association tariffs in order to ensure that access charges will be in place on January 1, 1984.

B. *Background: The Origins and Purpose of the Access Charge Proceeding*

9. This proceeding began in February, 1978 with the issuance of a *Notice of Inquiry and Proposed Rulemaking* (the "*Initial Notice*"), 67 FCC 2d 757 (1978), to determine the MTS-WATS market structure that would best serve the public interest. To resolve this fundamental question, we have issued four subsequent notices of inquiry.[3] Each represented a refinement in our understanding of the issues requiring resolution. In the *Third Supplemental Notice*, we concluded that a general policy of open entry in the domestic MTS/WATS market, including Hawaii, would be in the public interest. While tentatively reaching the same conclusion for the Alaska submarket, we decided to give further consideration to issues relating to that submarket. In light of the conclusions reached in the *Third Supplemental Notice*, we determined that future proceedings in this docket would be restricted to consideration of two issues. In Phase I of the docket, we would develop a system of access charges by which local telephone companies would receive compensation for the use of their plant to complete competitive interstate telecommunications offerings. In Phase II we would determine the appropriate market structure for MTS/WATS in the Alaskan submarket.

10. We recently resolved Phase II of the docket by affirming our tentative conclusion that an open entry policy in the Alaskan interstate MTS/WATS market would be in the public interest. *See Second Report and Order* in CC Docket No. 78–72, FCC No. 82–515, released November 30, 1982. Today we resolve Phase I by adopting rules that will determine the rates interexchange carriers and end

[3] Supplemental Notice of Inquiry and Proposed Rulemaking ("First Supplemental Notice"), 73 FCC 2d 222 (1979), Second Supplemental Notice of Inquiry and Proposed Rulemaking ("Second Supplemental Notice"), 77 FCC 2d 224 (1980); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking ("Third Supplemental Notice"), 81 FCC 2d 177 (1980); and Fourth Supplemental Notice of Inquiry and Proposed Rulemaking ("Fourth Supplemental Notice"), 90 FCC 2d 135 (1982).

users will pay for access to local telephone company facilities used to complete interstate service offerings. We believe that through these rules we shall achieve the competitive market structure that is the explicit goal of both this proceeding and of the MFJ.

11. As we have noted above, this phase of the proceeding was instituted to determine, first, whether the existing methods of compensation for exchange plant used in interstate telephone service should be replaced by a tariffed access charge framework and, second, if so, what the structure of such tariffs should be. The entry of the MFJ has effectively mooted the first question. Currently, approximately 80% of revenues for this plant are covered by the Bell System's Division of Revenues process. This private contractual agreement has transferred revenues of almost $7 billion per year within the Bell System. On the date of divestiture, the system will no longer exist. The MFJ requires the termination of this system and its replacement by a generalized tariffed offering of access service.

12. While it would theoretically be possible to maintain the private settlements mechanism (which is equivalent to the Division of Revenues plan) to compensate non-Bell telephone companies, we believe that, even absent this *Report and Order*, some generalized access charge tariff scheme would result. We now decide that the public interest requires that the basic structure of such access tariffs be set by this Commission. We expect access tariffs to be filed in 1983 and require that such access tariffs be in conformance with the rules adopted herein.

13. The plan described in this *Report and Order* is, of course, limited to basic, or regulated, services. The plan is also limited to interstate and foreign services subject to our jurisdiction. We have assumed, for purposes of the proceeding, that the existing *Separations Manual* correctly identifies the costs assignable to those interstate and foreign services. Some commenting participants, *e.g.*, Satellite Business Systems, have argued that non-traffic sensitive access costs should no longer be allocated between the intrastate and interstate jurisdictions. They propose that a single charge should recover the entire revenue requirement associated with non-traffic sensitive facilities. They claim that such a charge should fall within federal jurisdiction, despite the Supreme Court's decision in *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930). In this proceeding we need make no determination as to whether *Smith* requires jurisdictional separations of NTS plant. As we said in the *Fourth Supplemental Notice*, 90 FCC 2d at 154, it is the separations process that determines what costs must be recovered from the interstate jurisdiction by means of an access charge. That process is currently being investigated by a Joint Board and is beyond the scope of this docket. In the *Order Requesting Further Comments* ("Joint Board Order" hereinafter), the Joint Board specifically invited parties to comment on whether separation of NTS costs by jurisdiction is

required, and on the desirability of a discretionary assignment of 100 percent to either jurisdiction.[4] 47 Fed. Reg. 54479, 54517 (December 3, 1982).

14. Finally, we have limited our consideration here to the provision of that portion of interstate and foreign service which we consider to be "access" service. We had earlier used the term "access" to describe the use of certain exchange plant necessary to originate and terminate interexchange services. We have, however, decided to expand the scope of our access charge rules to conform to the boundaries established by MFJ. In the *Fourth Supplemental Notice* we suggested that it might be desirable to expand our access charge plan to encompass all services or facilities that will be included in access charges of the divested Bell Operating Companies ("BOCs") and invited "interested persons to submit suggestions for accomplishing that purpose." 90 FCC 2d at 153. We have concluded that such a course would be desirable because disparities would be likely to arise in the future if independent telephone companies and the undivested BOCs[5] are compensated through some other mechanism for services or facilities that are included in divested BOC access charges. The access rules we prescribe will therefore cover all services and facilities that are classified as exchange access for purposes of the MFJ. We are, however, adopting less detailed rules for the computation of charges for access elements that we might have excluded from our plan if the MFJ did not exist. For non-access interstate facilities and services, we have assumed that any questions concerning apportionment or allocation will be resolved in the *Interim Cost Allocation Manual* or a successor to that *Manual*.[6]

15. Although Phase I of this docket is a part of a larger proceeding to determine and encourage an optimal structure for a market that includes MTS and WATS, we have not limited this phase to the apportionment of access costs among competing interexchange carriers. The *Initial Notice* said that we expect to prescribe "divisions" for all interstate services of all carriers. 67 FCC 2d at 759.

16. We reiterated this view in the *Second Supplemental Notice*. We explained that subsequent events had confirmed our preliminary conclusion that it will not be possible to establish access compensation for the MTS-WATS equivalent services of the new interex-

[4] A decision to assign 100% to either jurisdiction would, of course, require changes in the access charge rules we are adopting.

[5] Cincinnati Bell Inc. and Southern New England Telephone Company.

[6] The *Interim Cost Allocation Manual* or "*ICAM*" was adopted in *Amer. Tele. and Tele. Co.*, 84 FCC 2d 384, *recon. denied*, 86 FCC 2d 667 (1981), *affirmed sub nom. MCI Telecommunications Corp. v. FCC* ("*ICAM*"), 679 F.2d 408 (D.C. Cir. 1982), to establish rules for the apportionment of AT&T costs among the MTS, WATS, private line and ENFIA service categories. We expect to provide guidance in separate proceedings to enable AT&T to reflect access charges in *ICAM* cost apportionments.

change carriers without correcting existing disparities in access compensation that is paid directly or indirectly by users of services offered by the telephone company partnership. AT&T had proposed access charges for MTS-WATS equivalent services that purported to establish parity with the access compensation for MTS and WATS that the BOCs receive through the Bell System division of revenues process. Carriers that provided the MTS-WATS equivalent services claimed that the proposed charges would create unlawful discrimination because the charges would be much higher than the charges that customers of Foreign Exchange ("FX") service pay for access service at the foreign exchange or "open" end. Those carriers alleged that the access they received was identical with the access FX customers received. The affected carriers eventually entered into an agreement known as "ENFIA" that established an intermediate rate for MTS-WATS equivalent (or "Execunet/SPRINT type") access for an interim period.[7] This Commission concluded that allowing the negotiated rate for an interim period would serve the public interest.

17. The *Second Supplemental Notice* concluded (77 FCC 2d at 230–231):

> The history of the ENFIA negotiations demonstrates that it would be impossible to prescribe any charges for the origination and termination of services that are functionally equivalent to MTS or WATS without determining the appropriate relationship among origination and termination services for MTS-WATS, functional equivalents of MTS-WATS, and FX-CCSA open ends. That history also indicates that there is no basis for assuming that the present relationship is appropriate.

18. That *Notice* also concluded that "the discrimination problem" is not confined to differences in access compensation among MTS, WATS, FX, CCSA and MTS-WATS equivalent services and described a tentative access charge plan that included the origination and termination of private line services. *Id.* at 231. Some comments that were filed in response to the *Second Supplemental Notice* questioned the inclusion of private line services other than FX and CCSA in an access charge plan.[8]

19. Private line services are not as distinct from an engineering or an economic perspective as they are sometimes perceived to be. A private line between two customer locations is normally routed in much the same manner as are telecommunications that use the switch that is used also for local exchange service. The access portion of the private line service consists primarily of the provision of lines or loops that connect a customer terminal with the interexchange

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[7] *See Exchange Network Facilities (ENFIA)*, 71 F.C.C. 2d 440 (1979).

[8] *E.g.*, American Satellite Co. Comments, p.7; ARINC reply, p.9.

portion of the facilities. The exchange carrier uses the right-of-way that it was granted for the purpose of providing local exchange service to place that line between the customer location and the interexchange facility.

20. Private line and message services not only employ similar facilities, but are also frequently used by customers to satisfy the same telecommunications needs. The interchangeability factor necessarily requires that at least some private line access service be included in an access compensation scheme that is designed to establish parity among all services that are reasonably interchangeable with MTS. We have specifically established such parity with MTS for the "open end" of FX and CCSA services.

21. It would be possible to distinguish private line service that is a close substitute for MTS from private line service that is not. We could possibly accomplish our original purpose by limiting access charge rules to access for MTS, WATS, MTS-WATS equivalents, FX, CCSA and other private line service that is a close substitute for MTS, limiting the scope of access to the use of equipment, facilities, or right-of-way used in common with local exchange services.

22. As already noted, however, we have decided, in response to the MFJ, to expand the scope of access to include all tariffed services and facilities that the BOCs will provide for the origination or termination of interstate calls. The decree definition of access service—and thus the conforming definition of access service relied upon in this *Report and Order* —includes some services and facilities that we might exclude in designing access charges for the sole purpose of establishing parity among MTS and all telephone company or "other" carrier services that are close substitutes for MTS.

23. The provision of an origination-termination service could be viewed as providing an interexchange carrier with access to exchange facilities. The service could also be viewed as providing an end user or subscriber with access to interexchange services through exchange facilities that interconnect with interexchange facilities.[9] The earlier notices in this proceeding viewed access services as

[9] When a divested BOC provides interstate access to another carrier, "interexchange" will usually be synonymous with a service that is described as inter-LATA for purposes of the MFJ and the "exchange" facilities will correspond to intra-LATA facilities. The geographic scope of access services provided by other local exchange telephone companies may be different. Such differences are most likely to be reflected in the access element we have described as Common Transport. The formula we have adopted for the computation of access charges will enable carriers to devise charges for the "common transport" that a particular carrier provides. Adapting access charge rules to access service that a divested BOC provides to itself or another carrier for an intra-LATA transmission that is interstate for purposes of the Communications Act may require a special approach. We have decided that it would not be appropriate to establish guidelines for such situations before a final determination of LATA boundaries.

services that a local carrier provides to a long haul carrier. These notices assumed that the local carrier would receive access compensation from a long haul carrier. Most of the earlier notices assumed that a carrier's carrier charge would be the mechanism for access compensation. The *Fourth Supplemental Notice* invited comment upon some additional alternatives that could result in a combination of end user and carrier's carrier charges. We have decided to prescribe such a combination. Terms such as access, access service and access charges will be used in this *Third Report and Order* to encompass both end user and carrier's carrier charges.

24. The inequities between existing forms of compensation for the identical use of such access plant by different interstate services make these forms an inappropriate model for the development of access tariffs. We have decided that a single, uniform and nondiscriminatory structure for interstate access tariffs covering those services that make identical or similar use of access facilities is required by the Communications Act. While we have provided considerable flexibility for telephone companies within our access rules, we believe that the development of the competitive interstate telecommunications market requires certain uniform principles covering both BOC and independent telephone company access tariffs.

25. The amount of money that will have to be recovered through the access tariffs is immense. The revenue requirement for interstate NTS exchange plant alone will be approximately 8.5 billion dollars in 1984, the first year of our plan. An additional amount of approximately 2.5 to 3 billion dollars will be required to recover the costs of traffic sensitive plant for the first year. Based upon the assumption that 100 million lines will be in use in 1984 (an assumption we consider to be reasonably accurate), this translates into a total revenue requirement per access line of approximately $8.50 per month for NTS costs and $3.50 to $3.00 per month for traffic sensitive costs. In its first year the plan would assign $4.00 per line per month or $4.3 billion overall in interstate NTS costs to be recovered directly from the end user by his or her local telephone operating company. Of this amount a minimum of $2.00 for residential subscribers and $4.00 for business subscribers would have to be recovered through the use of a flat charge. The remainder of the $4.00 per line revenue requirement could be recovered, at the carrier's option, through traffic sensitive charges. The maximum amount that could be charged any customer directly would be no greater than the interstate costs of obtaining a private access facility dedicated to interstate use. NTS costs over $4.00 per line—approximately $4.2 billion—will continue to be collected in the first year of the plan through carrier's carrier charges. Of this amount, $1.4

billion will be paid by AT&T and its partners in the form of a charge for premium access.[10] The costs related to the Universal Service Fund, terminal equipment (CPE) ($1.4 billion in 1984) and inside wiring ($1.6 billion in 1984) will either be removed from the carrier revenue requirement through deregulation or will continue to be paid in subsequent years through carrier's carrier charges. The remaining amount collected through a carrier's carrier charge in the first year plus any additional amounts added in subsequent years will be converted to customer charges over a five year period. Over the same five year period the maximum end user charge that may be charged any specific customer for interstate access for message service will be reduced at the rate of 10% per year.

26. The plan is designed to move swiftly and surely from the present reliance on additions to the price of interstate toll minutes as the mechanism for recovery of these costs towards a pricing plan which recognizes that non-traffic sensitive costs covering plant dedicated to individual end users neither increase nor decrease as a result of usage made of that plant. We are taking this important step because we view this new direction as the only means of satisfying our goals of universal service, nondiscrimination, network efficiency, and prevention of uneconomic bypass.

27. Economics teaches us that, except in certain circumstances involving market failure, prices equal to the cost of producing another increment of a good, i.e., equal to the marginal cost of production, are optimal.[11] Provision of telephone services involves two marginal costs. One varies with the traffic level. The other varies with the number of access lines demanded. For this reason, efficient pricing requires both usage sensitive and non-usage sensitive charges for recovery of access costs.[12]

28. The costs imposed upon the nation's telecommunications system, and ultimately upon the general public, by our present usage sensitive method of recovering these NTS costs pose a substantial danger to the long term viability of our nation's telephone systems. New technologies and radical improvements in older technologies make available alternatives to the traditional telephone network. Telecommunications is substitutable for a wide variety of other goods and services produced by our society. Prices based upon the true cost characteristics of telephone company plant are necessary both to make a decision on whether use of the alternative technolo-

[10] Some independent telephone companies will continue to participate in joint rate offerings with AT&T after access charges become effective. Therefore, the premium will in fact be paid by an interexchange partnership. Section 69.207 describes that partnership as "the carriers that offer MTS and WATS. . . ."

[11] *See*, for example, Francis M. Bator, "The Simple Analytics of Welfare Maximization," *The American Economic Review*, pp. 25–59, March 1957.

[12] *See also* P.R.G. Lazard and A.A. Walters, *Micro-Economic Theory*, McGraw-Hill Co., New York, 1978, p. 176.

gies is appropriate and to make a decision on whether to substitute telecommunications for other activities.

29. As telecommunications plays a larger and larger role in fundamental U.S. industries, the problems resulting from inappropriate pricing grow. Computer technology and communications have grown so similar that the Commission has redrawn its traditional definition of communications.[13] Access pricing that does not reflect cost can turn computer technologies from directions that would enhance the productivity of this essential U.S. industry and all of the industries that depend on computers and communications toward simple avoidance of non-cost based telecommunications prices. Investment may be misdirected as a result.

30. The possibility of users, particularly the nation's largest telecommunications users, abandoning the network for less efficient alternatives, *i.e.*, "uneconomic bypass", has been cited by many participants as a major justification for the movement toward cost based customer access charges. Bypass is a growing phenomenon.[14] We also recognize that the elimination of preferential rates covering NTS access plant for large users is certain to increase significantly the incentives of these users to bypass the local phone network. We could attempt to eliminate bypass through our facility authorization authority, but have determined that this is not a good solution. See Part III. A., *infra*.

31. Despite the uncertainty surrounding the precise size and threat of uneconomic bypass, a delay in the institution of a system of access charges that does not recover most fixed costs through usage rates is not justified. If we delayed making a change now, it is likely that circumstances would quickly force such changes upon us. In such a case, however, we would be unable to afford the luxury of the gradual transition needed to satisfy our objective of maintaining affordable service. Moreover, as a result of bypass, delay might mean higher long run costs for those who were required to remain on the network, and even for those who were able to use bypass services.

32. Moreover, were we to delay instituting the smooth movement towards a rational pricing system until a sufficient number of large users had initiated constructing alternative bypass systems, it could well be too late for any remedial action. Usually uneconomic bypass is uneconomic only before the construction of bypass facilities starts. Once a large telecommunications user has committed significant capital to building a private bypass system, the maintenance of that

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[13] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[14] Our staff has conducted a preliminary survey of the current status of bypass services. The results of that survey are set forth for informational purposes as Appendix F of the *Report and Order*.

system is no longer uneconomic. Consequently, we believe that prompt action is essential to preserve the public interest.

33. We believe it is important to state explicitly that this decision does not, in any way, constitute a judgment that subsidizing the costs of basic telephone services for certain customers or for all customers is improper. Our decision is, rather, based upon the more limited judgment that an attempt to generate revenues for such subsidization through a permanent bundling of NTS costs into interstate toll rates would be a harmful and, ultimately, futile approach—one that could lead to the deterioration of a nationwide telephone network providing a variety of services to a wide variety of consumers.

34. In the *Second Supplemental Notice* we had described a plan for imposing usage based charges for access to the local network upon both private line and public switched services. We had first thought that such an approach would assure full, fair competition in the MTS/WATS market and also avoid unlawful preferences or discrimination between private line users and users of switched services. Comments filed in response to that *Notice* caused us to question whether the plan might have the fundamental flaw of encouraging heavy users of private line service to bypass the local network. Our concern has been heightened by the terms of the MFJ that require AT&T to divest itself of its operating companies (other than Cincinnati Bell and Southern New England). For the first time AT&T itself could have a significant incentive to bypass local exchange facilities if such bypass would be profitable.

35. Responding to these concerns, in the *Fourth Supplemental Notice* we introduced an alternative approach that we believed could achieve our primary goals of promoting competition and eliminating discrimination while avoiding the potential problems of the original plan. Instead of creating an access rate structure for private line services like the usage-based MTS/WATS rate structures, we considered the possibility of treating facilities used for access to the public switched network like private line facilities. Specifically, we discussed the possibility of assigning the costs of non-traffic sensitive subscriber plant directly to the customers using it. Thus the costs of private line facilities would continue to be directly assigned,. removing one potential incentive for heavy users of such services to bypass local facilities. Every customer of interstate switched services would, however, pay a flat monthly charge reflecting the cost of the non-traffic sensitive subscriber plant dedicated to his use in connection with these services. The plan we adopt today will ultimately point toward this result. In order to avoid the adverse effects that could accompany such a departure from the traditional way in which end users have paid for their use of interstate services, the plan provides for the gradual introduction of these end user access charges. This plan, like the tentative plan of the *Second Supplemen-*

tal Notice, still imposes a carrier's carrier charge upon all interexchange carriers for the use of the remainder of local telephone company plant upon which they rely to complete their interstate service offerings.

II. *COMMISSION AUTHORITY TO ADOPT ACCESS CHARGE RULES*

36. Most comments that have been filed in response to the various notices we have issued in this proceeding do not discuss the scope of this Commission's statutory authority to prescribe access charges for the origination and termination of interstate and foreign services. Almost all of the participants have assumed that this Commission does have the power to prescribe some kind of access service compensation arrangement.

A. *Section 201(a) Authority*

37. After noting that the division of revenues and settlements "have traditionally been industry devised" (67 FCC 2d at 759), the *Initial Notice* said (*id.*) that "[i]t may be timely to exercise our jurisdiction under Section 201(a) of the Communications Act to establish the divisions of charges." The carriers that provide local exchange service receive most of their access compensation through the division of revenues and settlements procedures that have been devised to divide revenues from joint rate services among the members of the telephone company partnership. Section 201(a) authorizes this Commission to replace the industry-devised contractual arrangement with a Commission-devised formula.

38. Section 201(a) provides in pertinent part:

> It shall be the duty of every common carrier . . . in accordance with the orders of this Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

39. After we received comments in response to the *Initial Notice* and considered filings that were provoked by AT&T's initial ENFIA tariff, we tentatively concluded that a system of carrier's carrier access charges should be established to replace the existing combination of carrier's carrier charges, end user charges, and contractual "divisions" and "settlements." That conclusion was announced in the *Supplemental Notice* and a tentative plan for carrier's carrier access charges was described in the *Second Supplemental Notice*.[15]

[15] Several different methods have been used in the telecommunications and transportation industries to compensate participating carriers when two or more

40. Western Union comments that were filed in response to the *Second Supplemental Notice* claimed that Section 201(a) cannot be invoked to replace carrier's carrier access charges with different carrier's carrier charges. Western Union noted that the term "divisions" is normally used to describe the division of joint rate revenues and that it does not maintain any joint rates with the telephone companies. We have concluded that Western Union's claim is incorrect because the language and history of Section 201(a) demonstrate that Congress used the term "divisions" in that particular provision to encompass any arrangement for the compensation of carriers that participate in a through service.[16] That term is at least broad enough to include carrier's carrier charges that compensate an exchange carrier for its participation in a through service that an interexchange carrier offers to the public.

41. Section 201(a) authorizes this Commission to prescribe "divisions" if we find that such action is "necessary or desirable."[17] We have concluded that it is necessary and desirable to establish access charges in lieu of existing access compensation arrangements in order to eliminate existing access compensation disparities and to prevent the development of disparities that might arise if a variety of access compensation mechanisms were used in the future.

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carriers participate in the transmission or transportation. The ultimate customer or end user could be billed separately for the service each carrier provides, but the end user usually pays one of the carriers and that carrier transmits money to the other carrier. The end user may pay a combination or end-on-end rate that is equal to the combined separate charges of the participating carriers. The end user may pay a joint rate and the carriers may divide joint rate revenues in accordance with an agreed or prescribed formula. Sometimes one of the carriers offers the service to the public and pays a charge to a connecting carrier for the use of the other carrier's facilities. We have used the term "carrier's carrier" charge to describe such an arrangement and have used the term "end user" to distinguish the ultimate user from a carrier or an enhanced service provider that obtains service as a customer of another carrier. The carrier's carrier charge arrangement produces essentially the same result as the remission of a "local" rate by a carrier that collected a combination rate charge. Changes in a carrier's carrier charge are not, however, automatically and instantaneously reflected in the rate that an end user pays.

[16] In *St. Louis Southwestern R. Co.* v. *United States*, 245 U.S. 135, 139 n.2 (1917), the Court defined "through route" as "an arrangement, express or implied, between connecting railroads for continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." The Court added (*id.*) "Through carriage implies a through rate. This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the through route . . . ." The reports of the House and Senate Commerce Committees on bills that became the Communications Act of 1934 describe Section 201(a) as requiring carriers "to establish with other carriers physical connections, through routes, through rates, and divisions of through rates." Committee on Interstate Commerce, S. Rep. No. 781, 73rd Cong., 2d Sess., p. 4 (1934); Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5 (1934).

[17] *See United Telephone Co. of the Carolinas*, 54 FCC 2d at 289, 290 (1975), *affirmed*, *United Telephone Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977).

B. *Section 205 Authority*

42. When we issued the *Fourth Supplemental Notice* that invited comments upon some alternative plans that included end user access charges, we expanded the list of Communications Act provisions we might invoke to include Section 205. Section 205(a) of the Act, 47 U.S.C. §205(a), empowers this Commission to prescribe end user or carrier's carrier charges for any interstate or foreign service.

43. Although the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that carriers must follow in order to compute access charges. Our Section 205(a) power to prescribe charges includes the power to prescribe steps in the computation of charges. We have exercised that power in the past in prescribing a rate of return that is to be used in computing charges and in prescribing an allocation of investment and expense among major service categories that is to be used in computing AT&T rates. Those actions were affirmed in *Nader v FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) and *MCI Telecommunications Corp. v. FCC* ("*ICAM*"), *supra*.

44. Section 205(a) provides in pertinent part that whenever "the Commission shall be of the opinion that any charge . . . is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge. . . . " Thus, this Commission must find that existing charges are or will be unlawful and that the new methods for computing charges will be "just and reasonable" in order to prescribe methods for computing charges pursuant to Section 205(a).[18]

45. Paragraph 28 of the *Second Supplemental Notice* states that disparities in access service compensation "may also indirectly result in end user rates which violate Section 202(a) of the Communications Act. . . . " 77 FCC 2d at 230. We refrained from using conclusory language in that paragraph in order to afford persons who might wish to defend the *status quo* an opportunity to do so before we made a final determination with respect to the legality of the existing combination of access service compensation arrangements. We are now prepared to make such a determination.

46. Section 202(a) provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications,

[18] Section 205(a) states that the prescription power may be exercised "after full opportunity for hearings, upon complaint or under an order for investigation and hearing made by the Commission on its own initiatives. . . . " Notice and comment rulemaking proceedings are sufficient to satisfy that hearing requirement. *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 21–23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). Such proceedings also satisfy the Section 201(a) hearing requirement. *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1264–68 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

regulations, facilities, or services for or in connection with like communications services, directly or indirectly, by any means, or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47. The portion of Section 202(a) that prohibits "unreasonable discrimination" in connection with "like services" was derived from Section 2 of the original Interstate Commerce Act, 24 Stat. 379. Section 2 of the Interstate Commerce Act was designed primarily to eliminate rebates to favored shippers that produced different charges for the shipment of the same quantity of the same commodity at approximately the same time.

48. The portion of Section 202(a) that prohibits "undue" preferences was derived from Section 3(1) of the Interstate Commerce Act, 24 Stat. 380. Section 3(1) of that Act was designed to remedy disparities in rates to different points that did not reflect actual cost differences. Although Section 3(1) was designed primarily to remedy the locality discrimination problem, the prohibition also encompassed excessive rate differentials for different commodities and shipments of different quantities of the same commodity.

49. In view of the origin of Section 202(a) the unjust discrimination prohibition must be interpreted as imposing a heavy burden upon telecommunications carriers to justify any differential in rates for like services and the undue preference prohibition must be interpreted as imposing a duty upon carriers to maintain rational and reasonable differentials for unlike services.

50. The existing access service compensation arrangements do not produce results that are consistent with those Congressional objectives. This is scarcely surprising in view of the manner in which those arrangements evolved. Neither the carriers nor the regulators viewed access service as a distinct service before this Commission ordered the telephone companies to provide access service to the new "specialized" carriers.[19] The preexisting access compensation arrangements were by-products of managerial or regulatory decisions that were made for some purpose other than fixing access service compensation. Access service compensation for the new carriers could not be fixed in a manner that established parity with each of the preexisting services offered by the telephone companies or the old "other" carriers.

51. Comments from the carriers that receive access service compensation generally acknowledge that there is no system.

[19] *See Specialized Common Carrier Services*, 29 FCC 2d 870, 940 (1971), *affirmed sub nom. Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See also *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *affirmed sub nom. Bell Tel. Co. of Pennsylvania v. FCC*, *supra*.

Although comments from some carriers and some end users that indirectly pay access service compensation claim that any discrimination or preference problem can and should be remedied without changing the access compensation for some services, none of the participants has attempted to demonstrate that there is any reasonable or rational relationship to justify the wide disparities among the charges for access that are directly or indirectly levied upon users of the various interstate services that might satisfy the requirements of Section 202(a). It is readily apparent that it would be impossible to do so. Indeed, the current methods of recovering costs of jointly used non-traffic sensitive subscriber plant for MTS, open-end FX, CCSA and WATS services and the ENFIA services are totally different and produce widely differing results even though each service uses the same plant in the same manner. The FX and CCSA services pay local exchange rates for open end access, the MTS/WATS equivalent services must pay the higher ENFIA rates, and MTS and WATS pay even higher access compensation through the settlements and divisions of revenues process. The level of the ENFIA charge has been negotiated to reflect a discount from the MTS access compensation. It was also designed to produce a rate that is higher than the local exchange rate paid by FX and CCSA customers. Since no one has attempted to justify the disparate rates charged for like access services in this proceeding, we must find them to be unlawfully discriminatory. Moreover, the access compensation differences among services that do use exchange plant differently bear little relationship to actual cost differences. In the absence of any justification for such rate disparities, we must also find that such disparities violate the prohibition of undue preferences. We accordingly conclude that the existing combination of access service compensation arrangements violates Section 202(a) of the Communications Act.[20]

52. Moreover, the existing access compensation arrangements produce results that conflict with Congressional goals other than the elimination of discrimination or preferences that are discussed in Subpart II.D, *infra*. Congress has conferred broad powers upon this

[20] That conclusion is reinforced by the observations in a December 17, 1981 MCI filing. That filing was styled as a complaint, but could not be processed as a complaint because it was not directed at any existing tariff. We accordingly decided to incorporate that document as a comment in the access charge phase of this docket. *See Extension of ENFIA Agreement*, 90 FCC 2d 6, 9, n.3 (1982) *review pending sub nom. MCI Telecommunications Corporation v. FCC*, D.C. Cir. No. 82-1553. That MCI filing argued that "local exchange service" provided to business customers with PBXs, foreign exchange customers, WATS extension customers, Federal Telephone System customers, value-added carriers, domestic record carriers, international record carriers, time sharers and CCSA customers, was functionally identical to "local exchange service" provided to MCI. MCI requested that the Commission issue an order requiring that unlawful discrimination promptly be eliminated. As a result of this *Report and Order*, any discrimination among interstate services will be eliminated.

Commission in Section 4(i) of the Act, 47 U.S.C. §154(i), to adopt orders and regulations to achieve those goals. Those powers would be sufficient to enable us to adopt the access charge rules we are adopting in this *Report and Order* apart from the powers conferred by Sections 201(a) and 205.[21]

53. We believe that the procedures for computing access charges that we are prescribing in this phase of this proceeding are "just and reasonable" or "just, fair and reasonable" for purposes of Section 205(a). Several comments that were filed in response to the *Second Supplemental Notice* urged us to consider the then recent decision in *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980), in deciding how to proceed in prescribing new access service compensation arrangements. That court concluded that a Section 205(a) just and reasonable warranty does not require absolute certainty and precision. After noting that WATS tariffs had remained in effect for several years after this Commission concluded that AT&T had failed to demonstrate that existing tariffs are just and reasonable, that Court declared (*id.* at 340):

> [The Communications Act] assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. The standard of 'just and reasonable' rates is subverted when the delay continues for several years. Rate making theories may change; new information may become relevant; one proceeding may have to take account of another. But there must be some reasonably prompt decisionmaking point at which the FCC says: 'To the best of our knowledge and expertise at this time, the rates are just and reasonable. Perfect, perhaps not, but just and reasonable, yes.' That is all the statute requires.

54. Thus, a prescribed rate is just and reasonable for purposes of Section 205(a) if it represents the best approximation of a rate that satisfies all statutory requirements that this Commission is capable of devising within a reasonable period of time. We proceeded on that assumption when we adopted an *Interim Cost Allocation Manual* for AT&T services that we described as "far from perfect." *Amer. Tele. and Tele. Co., supra*, 84 FCC 2d at 411. The Court of Appeals for the District of Columbia Circuit affirmed that exercise of our Section 205 prescription powers. *MCI Telecommunications Corp. v. FCC (ICAM), supra.*

55. The rules we are adopting in this order are designed in part as a replacement for ICAM allocations of exchange and certain

[21] In *Nader v. FCC, supra*, the Court observed (520 F.2d at 203):

> The discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by Section 4(i) of the Communications Act, 47 U.S.C. §154(i) (1970), which gives the Commission the power to issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

interexchange plant costs. We believe that these rules represent a significant further improvement. In light of the Court of Appeals interpretation of the Section 205(a) warranty requirement, we can and do warrant that the rules for the computation of access charges and the allocation of access charge revenues that we are prescribing are "just and reasonable."[22]

C. *Effect of Dual Regulation Upon Commission Powers*

56. A number of participants have asserted that this Commission cannot prescribe particular types of access charges or cannot prescribe access charges at this particular time because such actions would intrude upon the jurisdiction or prerogatives of state regulatory commissions. One participant has even asserted that this Commission cannot prescribe interstate access charges of any kind because such power is vested in the state commissions.[23]

57. We believe the latter claim reflects a misconception with respect to the nature of jurisdiction to regulate interstate commerce. Any action of this Commission that establishes or prescribes charges for the origination and termination of interstate services cannot appropriately be described as a "preemption" of state regulation because such charges are appropriately within the federal jurisdiction, not state jurisdiction. Federal rate regulation began with the enactment of the Interstate Commerce Act in 1887. The creation of a federal commission to regulate interstate rail rates was prompted in part by the Supreme Court decision in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), that held that state legislatures and state commissions cannot regulate rates for interstate railroad shipments because such regulation is precluded by the Commerce Clause of the United States Constitution. The Interstate Commerce Act filled the gap in railroad regulation that was created by the *Wabash* decision. That Act was amended in 1910 to fill a similar gap in telecommunications regulation. The Communications Act of 1934 transferred jurisdiction to regulate interstate and foreign telecommunications rates from the Interstate Commerce Commission to this Commission.

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[22] Our decision to adopt the ICAM at that time was based in part upon our desire to comply with the Court of Appeals schedule for the resolution of some questions relating to WATS tariffs. Similar considerations have caused us to conclude that we should not defer the adoption of access charge rules in order to achieve further refinements. The MFJ will cause the filing of BOC access charge tariffs that will become effective on the day of divestiture unless we reject or suspend the tariffs. The public interest would not be served if we allowed BOC access charge tariffs to become effective and implemented a significantly different methodology a few months later. We have decided that we should act now in order to establish Commission access charge rules that can be implemented at the beginning of 1984.

[23] District of Columbia Public Service Commission, pp. 2–4.

58. The origination or termination of an interstate communication, including the use of a local loop between an end user's home or office and a local switch of a local exchange carrier, is necessarily a part of an interstate communication.[24] It is as much "in commerce" as the interexchange trunk that actually crosses a state line. If the *Wabash* principle is still applicable, the states would not acquire jurisdiction to regulate rates for such interstate access even if this Commission were abolished.

59. The Supreme Court's decision in *Smith v. Illinois Bell, supra*, supports this view of federal jurisdiction. In *Smith* the Court considered the validity of a state public utility commission prescription of telephone rates based on evidence that made no distinction between the interstate and intrastate uses of jointly used telephone property. The telephone companies and the regulators had been using a "board-to-board" separations methodology to determine toll and local exchange rates. The toll rates reflected transmission costs from one long distance switchboard to another. All the costs we have described as NTS and some of the traffic sensitive exchange plant costs were reflected in local exchange service rates. The Supreme Court concluded that the board-to-board method was improper. The Court said (*id.* at 148):

> The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.

60. We reject claims in some comments that the *Smith* decision in some way precludes this Commission from establishing any flat rates for interstate access.[25] The Supreme Court did not purport to determine whether state or federal commissions should mandate flat or usage rates or some combination of flat and usage rates for exchange or toll services. Such rate structure questions were not presented in that case and were not discussed in the opinion. The Court merely attempted to ensure that state or federal regulators do not exceed the limits of their respective powers when they determine economic and social policy questions that have been entrusted to their judgment.

61. The decision to exclude interstate access from local rates could have been implemented by including the interstate access costs in flat or usage rates regulated by federal regulators without violating any express or implicit directive in the *Smith* opinion. AT&T made the decision to recover the interstate exchange plant costs on a usage basis when it recomputed its interstate investment

[24] *See, e.g., New York Telephone v. FCC*, 631 F.2d 1059 (2d Cir. 1980).

[25] *See* Kansas Corporation Commission, p. 8; California Public Utilities Commission, p. 3; Haviland Telephone Co., p. 6; NARUC Reply, p. 8; Roseville Reply, p. 4.

and expenses in 1943 to reflect some exchange plant costs in interstate MTS rates. It had always imposed distance-weighted usage charges upon MTS customers and did not change the pre-existing rate structure when some NTS costs were added to the MTS costs. The NTS exchange plant costs represented a relatively small part of interstate MTS costs at that time. Changes in relative costs and separations allocations during the intervening years have caused NTS costs to become a very significant part of MTS costs. No opinion of this Commission prior to the *Fourth Supplemental Notice* discusses legal, economic or policy implications of recovering the NTS portion of MTS costs through flat or usage charges. Thus, the inclusion of flat charges in an access charge plan does not conflict with precedent. It merely alters a carrier-initiated practice that appears to be the product of historical accident.

62. We accordingly conclude that this Commission's discretion to establish flat or usage charges or some combination of flat and usage charges for interstate access is not inconsistent with past court or Commission decisions.

63. Some comments have expressed the view that we are required to consult with state regulators through the Joint Board mechanism before we make any final decision to adopt an access charge plan.[26] We received extensive comments with respect to the appropriate role of a Joint Board in response to the *First Supplemental Notice*. We concluded in the *Second Supplemental Notice* that a Joint Board referral of questions with respect to interstate rates and the apportionment of interstate costs among interstate services would not be necessary or desirable. 77 FCC 2d at 236.

64. Most who claim that a Joint Board must or should be consulted claim that interstate access charges will affect jurisdictional separations.[27] Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), requires that this Commission obtain an Initial Decision of a Joint Board composed of three federal and four state commissioners before we adopt any change in separations rules.

65. The Missouri Public Service Commission Staff claims a Joint Board referral is mandatory because the implementation of access charges will affect the results that are produced by any separations formula. We do not believe Section 410(c) requires any Joint Board consideration of decisions that merely indirectly affect separations

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[26] *See* Kansas Corporation Commission Staff, pp. 1–2; Michigan Action Group, p. 6; NARUC, p. 4; Missouri Public Service Commission Staff, pp. 2–3; Michigan Public Service Commission, p. 4; California Public Utility Commission, p. 3; Rural Telephone Coalition, pp. 43–48; REA, p. 2; Haviland Telephone Co., p. 5; Utah Public Service Commission, p. 2; Ketchikan Public Utilities, pp. 3, 10; Rural Coalition Reply, p. 41; NARUC Reply, pp. 8–9.

[27] We are using the term "separations" to describe the process of apportioning investment and expense between the interstate and intrastate jurisdictions. We are not using the term "separations" to describe the divisions/settlements process that is described in the *Second Supplemental Notice*. *Id.* at 226–228.

results. Every rate decision by this Commission or any state commission has some effect upon separations results. The regulatory processes would be paralyzed if consultation were required before a state or federal commission adopted any decision that affects separations results.

66. Most participants who say that interstate access charge questions should be referred to a Joint Board contend that the adoption of access charges rules will affect the final decision in the pending Docket 80–286 proceeding to reexamine separations rules for the apportionment of exchange plant. NARUC and the Rural Telephone Coalition even assert that the outcome of that proceeding will be "foreordained" by any decision to adopt rules for the computation of interstate access charges. *See* NARUC Reply, p. 9.

67. Such fears are unfounded. We have, of course, asked the Joint Board to consider consistency with access charges in formulating its recommendations for separations changes. *Amendment of Part 67 of the Commission's Rules*, 78 FCC 2d 837, 845 (1980).[28] We have also necessarily made some assumptions with respect to the likely outcome of the pending separations proceeding in order to devise access charge rules that can be implemented in 1984. These actions should not be interpreted as a final decision upon the part of this Commission with respect to questions in Docket No. 80–286 and should not be interpreted as inhibiting the discretion of the Joint Board in formulating its recommendations. If the final decision in that proceeding departs from our current assumptions in a manner that requires a revision of the access charge rules, we will, of course, revise the rules we are adopting in this *Report and Order*.

68. Some participants have recommended that we either refer access charge questions to the Docket 80–286 Joint Board or defer action on access charges until we make a final decision with respect to separations changes in order to avoid the possibility that access charge rules may have to be revised to fit unanticipated separations changes. We have concluded that such a course would not be desirable under the present circumstances because a delay of a few months in the adoption of access charges would not allow sufficient lead time to enable carriers to prepare access charge tariffs that can be filed on or before October 3.[29] If BOC access charges that are not based upon these rules become effective at the beginning of 1984 and radically different charges were substituted a few months later, we could expect considerable confusion and disruption. Such a scenario would be likely to create far greater problems than any changes that

[28] Part III of the *Joint Board Order* discusses possible separations changes to achieve consistency with access charges.

[29] Access charges must be filed on October 3, 1983, to provide a full 90 days notice before a January 1, 1984 effective date.

might be required to adapt access charges to fit unanticipated separations changes.[30]

69. Some participants have suggested that we refer access charge questions to a Joint Board because they hope that such a proceeding would produce a consensus among all regulators that would enable carriers to compute interstate and intrastate access charges in the same manner. It appears doubtful that such a consensus would emerge within a short period of time. Some participants have proposed alternative methods to achieve unified access charges. SBS has proposed that we preempt state regulation of intrastate access charges and others have suggested that we delegate responsibility for interstate access charges to the state commissions. We rejected somewhat similar suggestions when we adopted the *Second Supplemental Notice*. 77 FCC 2d at 232.

70. Unified access charges conceivably might be achieved without new legislation by assigning 100% of the exchange plant investment and related expenses to one jurisdiction or the other. Such a change in jurisdictional separations would, of course, have to be considered by a Joint Board in the first instance. The Joint Board has recently invited comments with respect to the legality and desirability of a 100% assignment of NTS costs in Docket 80–286. *See* para. 13, *supra*.

71. We believe there is reason to hope that a considerable degree of uniformity will in fact emerge even though this *Report and Order* does not require that state commissions follow this Commission's approach to charging for access. The same considerations that have led us to conclude that our plan is an appropriate strategy for reducing discrimination may lead many state commissions to reach similar conclusions. Moreover, all commissions will necessarily recognize that administrative efficiency is served when a single approach to structuring access charges for long distance use of local plant is adopted. State commissions that do not choose to recover all costs in precisely the same way will undoubtedly find many of our methodologies helpful. State commissions will also have an incentive to adopt end user charges because failure to adopt a similar approach to the recovery of non-traffic sensitive costs assigned to state toll would increase toll rate disparity.[31]

72. Our access charge plan for NTS plant is based upon the

[30] Many decisions that affect the computation of access charges will, of course, be made in the separations proceeding. For example, the size of the Universal Service Fund, the characteristics of participating exchange carriers, and the formula that indirectly determines Fund distributions to particular local exchange carriers will be determined in Docket 80–286 after an Initial Decision of that Joint Board.

[31] Toll rate disparity describes the condition that occurs when, because of different ratemaking philosophies adopted by the federal and state jurisdictions and other factors, a call of given duration is priced at different levels depending upon whether it is intrastate or interstate. Toll rate disparity sometimes results in a

following four principles. First, it is important to move towards collecting these costs from customers rather than carriers and on a flat rather than on a usage sensitive basis. Second, it is important to accomplish the transition to flat rates in a smooth and measured way. Third, it is vital to ensure that the plan does not threaten the universal character of telephone service. Fourth, the plan should provide for sufficient flexibility so that telephone companies serving dramatically different service areas can adopt transitional approaches that best serve their unique areas.

73. While the precise timing and mechanics of our access charge plan are based upon the interstate telecommunications market, we believe that these same four principles can serve as the basis for appropriate and acceptable state access charge plans. Obviously, the precise minima, maxima and transition periods would reflect not only unique state usage characteristics but also the level of NTS assignment to state toll service. We stand ready to provide technical or other assistance to state commissions that wish to integrate their access charge plans with the interstate approach. This integration would also be appropriate, technically feasible and reasonable with respect to traffic sensitive plant.

D. *Effect of Section 1 Upon Commission Discretion*

74. Although we are establishing rules for the computation of interstate access charges in order to remedy discrimination and preferences that violate Section 202(a) of the Communications Act, we are also required to consider other policies in designing an appropriate remedy. A variety of different methods could be used to produce access charges that do not result in unreasonable discrimination or undue preferences. We must be guided by Congressional goals expressed in Section 1 of the Act, 47 U.S.C. §151, in choosing among such methods. We observed in the *First Supplemental Notice* that "[a]ll provisions of the Act must be read in the light of that statement of purpose." 73 FCC 2d at 230.

75. Section 1 provides in relevant part:

> For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of promoting safety of life and property through the use of wire and radio communication, . . . there is hereby created a commission to be known as the 'Federal Communications Commission,' . . . which shall execute and enforce the provisions of this Act.

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price for a call to a city in the same state that is much higher than the price for a call to a more distant city in another state.

76. The *First Supplemental Notice* said (73 FCC 2d at 230):

> The reference to the rapidity and efficiency of service and the adequacy of facilities obviously means that Congress wanted to maintain and enhance the quality of communications services. The reference to reasonable charges demonstrates that Congress was also concerned with the level of rates and expected this Commission to follow policies which would mnimize the cost of communications services to ultimate users. This concern with the cost and quality of service demonstrates that economic efficiency is one of the goals of the Act.

77. An efficient communication service could also be defined in a narrower sense as efficient utilization of a network that enables a carrier to provide service at the lowest possible unit cost. Customer choices that affect the utilization of a network are necessarily influenced by the rate structure. Therefore, the creation of customer incentives that will promote efficient network utilization necessarily must be one of the objectives of any rate structure proceeding.

78. The bypass phenomenon that we discussed in the *Fourth Supplemental Notice* can be viewed as a network utilization problem. Diversion of traffic to bypass facilities that are in fact more costly than the access facilities provided by the local exchange telephone companies obviously would not promote efficient utilization of telecommunications facilities. Therefore, we concluded that discouraging uneconomic bypass must be one of the criteria for the design of an access plan.

79. The *Fourth Supplemental Notice* identified a fourth objective in addition to eliminating discrimination or preferences, promoting efficient network utilization generally, and discouraging uneconomic bypass. We said that an access charge plan should be designed to "limit any substantial setback in the availability of telephone service" (90 FCC 2d at 147) and noted that some options could produce "an increase in the price of access to the public network, and a possible reduction in the subscriber base." *Id.* at 140.

80. Most participants who filed comments in response to the *Fourth Supplemental Notice* apparently agree that encouraging persons to subscribe to local exchange service must be one of the objectives of this proceeding. This is usually described as the "universal service" objective or goal. The term "universal service" has rarely been defined. Most participants apparently agree that "universal service" has existed on a nationwide basis for several years. In the context of this proceeding a "universal service objective" means avoiding actions that would cause a significant number of local exchange service subscribers to cancel that service.

81. Although interstate access charges will not have any effect upon local exchange service rates, a customer's decision to subscribe to local exchange service will necessarily be affected by the combined fixed charges that a customer must pay to access all services from a

terminal in his own home or place of business. One could not describe every increase in fixed charges subscribers must pay for local, intrastate toll and interstate access as conflicting with a universal service objective. Such a conflict would arise only if the magnitude and timing of any increase in the fixed charges were sufficient to cause a significant number of subscribers to cancel service.[32]

82. Although most participants apparently agree that universal service is one of the goals of the Act, MCI has questioned the existence of such a statutory goal. Comments, p. 5, Reply, pp. 5–6. The term "universal service" does not appear in the Communications Act and the existence of a universal service goal may not be self-evident from the language Congress used to describe its purposes in Section 1.

83. The *First Supplemental Notice* noted that making service "available . . . to all the people of the United States . . . at reasonable charges" could mean that "Congress wanted to create conditions in which such services, or some of them, are 'affordable' to all." 73 FCC 2d at 231. We also said: "While this may be a credible interpretation of Section 1, it does not appear to be the only possible interpretation." *id.* We have now concluded that the "available . . . to all" language does contemplate that telephone exchange service should be made available at reasonable rates. Such a universal service goal should also be inferred from the Congressional declaration that "promoting safety of life and property through the use of wire and radio communication" is one of the purposes of the Act. A subscription to local exchange service can be useful for safety purposes.

84. Many of the participants have argued that the relative universality of service affects the value of a telecommunications service for all users of a service. If some persons elected to cancel local exchage service, other customers would not be able to place local or long distance calls to those persons. Even if economic efficiency were the sole goal of the Act, a diminution of universal service might reduce economic efficiency in a broader sense.

85. In addition to those four objectives, we necessarily must consider the competitive effects of alternative rate structures. We concluded in the *Third Supplement Notice* that a competitive interexchange market structure will further the goals of the Communications Act. If identical access services were offered to all competing interexchange carriers, we could assume that cost-based access charges will lead to an optimal interexchange market structure. This is not the case today and it will not be possible to remedy all inequalities in access service offerings before the initial access charges become effective. Therefore, preserving an opportuni-

[32] Appendix G of this *Report and Order* describes and discusses past studies of the effect of rate increases upon demand for local exchange telephone service.

ty for fair competition during a transition period must also be viewed as an objective that will further the goals of the Act.

86. The relative priorities that should be afforded goals or factors that can be inferred from Section 1 is an open question. The priorities question was also discussed in the *First Supplemental Notice*. Paragraph 24 said (73 FCC 2d at 231):

> Some comments have suggested that we establish relative priorities in this Supplemental Notice which will be observed if some of the explicit or implicit goals of the Act conflict. It would be unwise to assign any priorities at this time. It seems unlikely that Congress intended to give priority to any particular goal under all conceivable circumstances. A public interest determination is necessarily a balancing process which requires the exercise of judgment, and different goals may take precedence depending on the facts of each case. Therefore, we shall wait until the facts have been developed in the record before we attempt to set priorities for goals in this case.

87. Although those observations related primarily to the entry policy question and a Section 214 public interest determination, we believe that a similar balancing process is required when we exercise our Section 201(a) power to establish through rate divisions or our Section 205 or Section 4(i) powers to prescribe steps in the computation of a charge.

88. An ideal access charge plan would eliminate all discrimination or preferences within or among services, create incentives for the most efficient utilization of all telecommunications facilities, discourage all uneconomic bypass, ensure that no local exchange service subscriber cancels that service, and establish full and fair competition in the interexchange services market. All of those objectives could not be fully accomplished simultaneously and immediately even if we had perfect knowledge. Therefore, we necessarily must exercise judgment and discretion in devising an access charge plan that takes all of those objectives into account.

89. Neither the language of the Act nor past court or Commission opinions preclude this Commission from striking a reasonable balance. On the contrary, Congress undoubtedly anticipated that an exercise of judgment would be required when it declared that it was creating this Commission in order to achieve multiple purposes "so far as possible." Congress conferred broad discretion upon this Commission in order to enable us to fulfill that mandate.

III. *GUIDELINES FOR RECOVERY OF NTS COSTS*

A. *Alternative Strategies For Reducing Discrimination*

90. Exchange plant that an end user or subscriber would need in order to use any local or long distance service is often described as non-traffic sensitive or NTS plant because the cost of providing such

equipment does not vary with usage. NTS encompasses all equipment that a subscriber would need to access the local exchange switch including terminals and other customer premises equipment, the protection block and drop wire and the line or loop between the customer's premises and a local exchange switch or a manual switchboard.

91. A portion of a local dial switch is also classified as non-traffic sensitive plant for separations purposes in order to segregate costs of terminating a line in the switch from the costs of switching. We proposed to include such costs in a non-traffic sensitive element in the tentative plan described in the *Second Supplemental Notice*. We subsequently asked a Joint Board to reexamine the classification of local dial switching equipment.[33] Inasmuch as that proceeding may produce new classifications we have decided that it would not be appropriate to include any local dial switching equipment in an NTS access plan at this time.

92. In order to achieve parity between interstate and international services that use the same subscriber line that is used for local exchange service and other services that are close substitutes for such services, an NTS plan must include comparable facilities that are used by such substitute services. Therefore, for purposes of this *Report and Order* NTS also includes portions of various lines on the customer's side of the class 5 or "end office" that are dedicated to a particular service. These include a WATS access line, an FX or CCSA "closed end" line, or a "private line" terminating in a PBX or other customer premises equipment that may be used for local exchange service. Our NTS plan does not encompass customer side dedicated lines that do not terminate in such equipment.

93. In the *Second Supplemental Notice* we presented a tentative plan to achieve parity among such services by apportioning the total NTS costs among four service categories—MTS/WATS, FX-CCSA Open End, OCC-ENFIA and Private Line—on the basis of relative use. This would have represented a substantial departure from the cost apportionment that is presently used to compute private line rates. The *Separations Manual* has generally assigned the entire cost of facilities that are used exclusively for interstate services to the interstate jurisdiction and has usually apportioned the cost of facilities used jointly for interstate and intrastate calling. A usage-based formula has traditionally been used to apportion jointly used NTS facilities between the jurisdictions. For ratemaking purposes all costs of AT&T assigned to the interstate jurisdiction are apportioned among interstate service categories through the *ICAM*.[34] The costs assigned by the *ICAM* to private line services are, in general, based

[33] *Amendment of Part 67 of the Commission's Rules, supra*, 78 FCC 2d at 842.

[34] *See* footnote 6, *supra*. With some exceptions the other telephone companies concur in AT&T's tariffs for MTS, WATS and private line service.

upon the assignment of these costs to the interstate jurisdiction. Thus, the present rates for private line services reflect the "directly assigned" costs of private line loops. Inasmuch as private line customers normally have very high usage per line as compared to MTS customers, a usage cost allocation would produce a per line assignment to private lines that is much higher than the per line cost that is directly assigned under the *Separations Manual.*

94. Many of the comments that were filed in response to the *Second Supplemental Notice* contended that it would be unjust, inequitable and unlawful to compel private line customers to pay charges that are based upon a cost assignment that exceeds the actual cost of the line they use. Many of those comments also contended that a usage assignment of such fixed costs would be uneconomic because it would discourage usage by pricing the facilities in a manner that greatly exceeds the actual costs of the private line loops.

95. Those arguments caused us to reexamine the assumption that discrimination or preferences between private line and MTS users could best be corrected by assigning all NTS costs on a usage basis. The ratemaking principles advanced in those comments would compel the conclusion that the existing MTS rate structure is incorrect because the usage rates for MTS allocate some fixed costs on a usage basis. The same arguments would support the conclusion that the MTS rate structure compels large MTS users to subsidize other MTS users because a large user of that service would pay NTS costs that substantially exceed the cost of the NTS facilities such a customer uses to make MTS calls. That analysis also suggests that the increasing use of private lines for purposes that could be served by MTS reflects an effort to avoid the subsidy that is inherent in the MTS rate structure and that private lines are being used inefficiently to serve purposes that from a network standpoint could be accomplished more economically through MTS.

96. The discrimination or preference problem could not be solved by maintaining the *status quo.* If one assumes that all users of competing services should pay per minute charges for NTS, total equality could be achieved by apportioning total NTS costs among such services on the basis of minutes of use. If one assumes that all users of competing services should pay per line charges, total equality could be achieved by continuing to assign private line NTS costs on a direct assignment basis and revising the MTS rate structure to include a flat charge for NTS and a reduced usage charge for the other exchange and interexchange facilities that are used to place an MTS call. We described those alternatives as "pure strategies" in the *Fourth Supplemental Notice* because they would produce equality on a per minute or on a per line basis. For convenience, we called the usage apportionment described in the

Second Supplemental Notice "Pure 1" and the per line apportionment alternative "Pure 2."

97. Section 202(a) of the Communications Act does not require total equality of rates at all times or under all circumstances. The Act prohibits "unjust or unreasonable" discrimination, "undue or unreasonable" preferences, and subjecting persons or localities to an "undue or unreasonable prejudice or disadvantage." This necessarily implies that departures from total equality are permissible and may be required to achieve Communications Act goals other than the elimination of discrimination or preferences. The *Fourth Supplemental Notice* accordingly invited comments upon "mixed" strategies that might combine usage and flat charges or usage and fixed cost apportionments. We described two examples of such "mixed strategies" in that *Notice* and invited interested persons to suggest other alternatives. The *Notice* called the two examples "Mixed 1" and "Mixed 2" for convenience. "Mixed 1" would have allocated NTS costs between MTS/WATS and private line service using "equivalent lines." While the charge for private line users would have been a flat rate, each would be required to participate in the "contribution" to the local revenue requirement embodied in an interstate revenue requirement based on the subscriber plant factor. The "Mixed 2" strategy would have continued charging for private line services on a dedicated basis, but would have imposed a new rate structure on MTS. Under this plan, customers would be charged a usage based rate for recovery of NTS costs up to a cap. After this point, no additional NTS contribution would be required. Thus there would be economically efficient pricing for those calls made after the cap was reached.

98. Our decision to invite comments on alternative plans was based on developments that had occurred since the adoption of the *Second Supplemental Notice* and that suggested that Pure 1 might not be feasible even if we concluded that per minute equality would be ideal. At the time we adopted the *Second Supplemental Notice* we assumed that a reapportionment of costs among service categories would produce a shift from telephone company private line services to MTS that would enhance efficient utilization of the telephone companies network by discouraging the use of service-dedicated lines for purposes that could be served by the use of lines that can be commonly used for multiple services to multiple points. We also assumed that the reallocation of costs would produce a reduction in MTS rates.

99. The comments that were filed in this proceeding in 1980 did not dispute those assumptions, but some of the 1981 comments in the Joint Board proceeding did. Several of those comments noted that new technologies provide alternatives to the use of any telephone company loop for the orgination or termination of interexchange telecommunications. Some asserted that any change in rate struc-

ture that increases telephone company private line charges would cause private line users to shift to such alternative services. Some also asserted that the access compensation that is reflected in MTS rates must also be reduced in order to avoid a shift to alternative technology services that "bypass" all telephone company facilities.

100. The subsequent settlement of the AT&T anti-trust case caused us to conclude that bypass may be an even more imminent possibility than it originally appeared to be. AT&T would have a much greater capability to provide bypass services on a large scale than other entrants in interexchange markets. AT&T would not have any incentive to do so as long it retained a massive investment in local exchange facilities. The divestiture of all of its local exchange facilities would remove that inhibition.

101. The selection of a cost apportionment method necessarily affects the decision to prescribe end user or carrier's carrier access charges or some combination of such charges. Although some access charge options might be implemented through any of those methods, the Pure 2 alternative necessarily requires flat rates that are assessed upon end users in order to ensure that each end user pays the fixed costs that are attributable to NTS facilities that are dedicated to that particular user. Such a flat end user charge also must be collected by the exchange carrier because the subscriber line that is used for MTS access can be used for other interstate services including open end WATS, FX and CCSA originations and terminations and switched services offered by carriers that compete with AT&T interexchange services. The *Fourth Supplemental Notice* assumed that Pure 1 or Mixed 1 would be implemented through carrier's carrier access charges and Mixed 2 would be implemented through end user charges.

102. Each of the plans received support from at least some of the participants who responded to the *Fourth Supplemental Notice.* Several states and small telephone companies preferred the Pure 1 scheme. Mixed 1 received some support from commenting parties. This approach was supported (at least as an interim measure) by several participants who were convinced that a Pure 1 approach was overly restrictive.[35] Participants supporting this approach argued that private line users should be expected to contribute to the support of the nationwide system. To some extent the support for Mixed 1 appeared to be based on the perception that this approach represents a relatively small deviation from the current rate structure.

103. Pure 2, or some variation of Pure 2, was supported by many of the participants who filed comments in response to the *Fourth Supplemental Notice.* Most of the support for Mixed 2 came from

[35] *See,* e.g., Comments of Florida PSC, Michigan PSC Staff, NARUC, Oregon PUC, Washington UTC.

those who saw it as the first step toward a Pure 2 approach. However, while the concept of a rate structure combining a flat fee with a usage-based charge to recover NTS costs received considerable support, the Mixed 2 scheme itself was viewed by most participants as unviable. Because many customers make few or no calls in any one period, and because the interstate jurisdiction is assigned NTS costs regardless of the actual use of those facilities, both the charge per unit of use and the cap would have had to be so great that the benefits of cost-based pricing would have been denied to most consumers. Thus, even those participants supporting a rate structure that combined a usage charge with a flat fee were almost unanimous in recommending that each end user be assessed some flat fee for access to the network regardless of his actual usage.

104. We have decided that none of the access charge options presented in our *Fourth Supplemental Notice* is entirely satisfactory. The access charge plan that we are adopting herein is more complex, and we believe it fair to say more sophisticated, than any of these options. Our new plan, however, incorporates elements of the options in the *Fourth Supplemental Notice* and reflects the ideas and suggestions expressed in many of the comments.

105. The pure strategies that were discussed in the *Fourth Supplemental Notice* do have the advantage of providing for a uniform rate structure for MTS and WATS service on the one hand, and private line services on the other. This is an important advantage because we have found that it is virtually impossible to eliminate discrimination among services while maintaining the current MTS/WATS structure and encouraging cost-based rates for other services. We have attempted for many years to eliminate unreasonable discrimination among private line, WATS, and MTS services. These attempts have imposed heavy burdens on users, carriers, and on the Commission, but have achieved, at best, mixed results. We conclude that the costs associated with the non-traffic sensitive plant used to provide these services must ultimately be recovered through charges based on the same rate structure.

106. These NTS facilities are essentially identical regardless of the service with which they are associated. Specifically, all of these facilities include access loops and associated wire and CPE that are dedicated to particular customers and allocated to the interstate jurisdiction. We have found in Part II. B, *supra*, that the rate structures for recovering the costs of these similar facilities are very different and result in unlawful discrimination. Only by charging for these facilities on a similar basis can the problems of discrimination be resolved.

107. Although the Pure 1 approach would have the advantage of charging all facilities on the same basis, we must reject the Pure 1

option. Comments by numerous participants have convinced us that bypass is an actual threat and present danger.[36] For this reason, and because of the dynamic economic distortions that Pure 1 would impose on the U.S. economy, we find Pure 1 to be an unacceptable solution.[37]

108. In the *Fourth Supplemental Notice*, we asked whether large users were likely to abandon the network if they were forced to pay prices equal to those paid by MTS users (the Pure 1 approach). Numerous comments indicated that bypass is real. Even with today's rate structure, which allows many large users to escape paying the full MTS rate through use of private line or other services, many large corporations and state, local, and federal governments are planning or using facilities that bypass the local loop. Newly available technologies such as digital termination service (DTS) and cellular radio provide valuable new services in their own right, but may also be used to provide uneconomic bypass if access pricing continues to diverge from cost. Alternative means of resolving unlawful discrimination among services (such as the plan proposed in the *Second Supplemental Notice*) would encourage still more bypass.

109. Because users have alternatives to the traditional telephone network, it is increasingly difficult to force heavy users to pay rates that greatly exceed their costs. Such users would abandon the network, leaving the small consumers who have fewer options with the full costs of the network. Indeed, attempts to overrecover costs from those groups most able to escape these charges may backfire and result in inferior service to large and small users alike.

110. Many participants responded to our expressed concern with the effects of uneconomic bypass by suggesting that we use our powers under Section 214 of the Communications Act, 47 U.S.C. § 214, to deny authorizations to construct facilities that would bypass local telephone company facilities.[38] We reject that suggestion. We noted in the *Fourth Supplemental Notice* that a flat prohibition of bypass services would not be desirable because bypass services can serve functions that are not adequately served by existing telephone company services. We also noted that overpricing of telephone

[36] *See, e.g.*, comments of Aeronautical Radio, Inc; American Petroleum Institute; Association of Data Communications Users; AT&T and BOCs; Centel; Executive Agencies of the United States; Florida PSC; IBM; Ketchikan Public Utilities; Nevada PSC; NTIA; Pennsylvania PSC; Rochester Telephone; SBS; Southern New England Tel (SNET); Southern Pacific Communications (SPC); United Telephone System, Inc.; USITA; Western Union.

[37] Such distortions include the misdirection of investment and industry from paths that make the most productive use of communications to paths that respond to non-cost related communication pricing. For example, the development of computer and related technologies could be inhibited by such a rate structure.

[38] *See, e.g.*, NARUC and Rural Telephone Coalition comments.

company services could lead to the substitution of bypass services that may in fact be more costly to provide than telephone company services that could serve the same purpose. We concluded that access charges should accordingly be designed to avoid this "uneconomic bypass" and invited interested persons to comment upon the compatibility of various pure or mixed NTS access plans with that objective.

111. We continue to adhere to this view. Development of bypass technology provides a competitive spur to ensure that the telephone system offers the type of service that is in demand and is technologically feasible. In many cases it may be appropriate to use some service other than the traditional wireline carrier. We are simply not in a position to determine what constitutes an uneconomic "bypass" service and what is a wholly new service that will attract a new set of users and enhance the ability of all users to make full use of telecommunications service-potential. For example, some comments assert that cellular services constitute a bypass technology. We have concluded, however, that cellular radio is a distinct service that serves distinct needs and that cellular service could be complementary to existing wireline service. Indeed, a given technology may be the efficient means of providing service to certain groups yet constitute uneconomic bypass for other services or groups.

112. In addition to the bypass problem, long run reliance upon usage-based prices for the recovery of fixed-costs will distort economy-wide investment decisions, artificially restrict calling patterns, and may jeopardize the competitive position the U.S. now holds in the world marketplace. In comments filed in response to the *Fourth Supplemental Notice*, NTIA has estimated that non-cost based pricing results in a $1.7 billion annual consumer loss due to repression of calls that would have been made at rates equal to cost. While we have some questions concerning the methodology used in this study, we find the prospect of losses of such a magnitude to be deeply disturbing.[39]

113. Cost-based rates provide correct signals to the marketplace. Both investors and consumers are certain to respond to such cost-based rates by redirecting their behavior in ways that redound to the benefit of the U.S. economy. In the short run, substantial growth in toll calling could be expected as consumers make better use of the network. In the long run, technologies that make more intensive use of the telecommunications system will create even larger benefits. In

[39] In an independent study, James Griffin estimates this loss (including the loss due to intrastate MTS pricing) as $1.5 billion annually. *See* James M. Griffin, "The Welfare Implication of Externalities and Price Elasticities for Telecommunication Pricing," *Review of Economics and Statistics*, February 1982, pp. 59–66. Certain assumptions underlying the results of this study are questionable or unclear. Nevertheless, while this Commission has been unable fully to corroborate estimates of damage, the evidence that significant harm results from current pricing structures seems strong.

an economy increasingly dependent upon information and communications, the dynamic losses caused by investment misdirection can no longer be afforded.

114. Arguments against the Mixed 1 option were similar to those leveled against Pure 1. As with the Pure 1 approach, rates for private line users would be substantially increased. As with Pure 1, it was argued that such substantial rate increases would result in bypass and in economic inefficiency. Several of these participants also argued that the means by which the contribution would have been allocated between private line and message services under Mixed 1 was arbitrary.[40]

115. We are persuaded that either the Pure 1 or Mixed 1 approaches would result in rates that are unrelated to costs for an important class of users and that any subsidy that could be collected from these rates would be shortlived. As users who are best served by the telephone network found lower priced (though higher cost) alternatives, society as a whole would be the loser and the public interest would be disserved.

116. The Mixed 2 plan would eliminate much of the discrimination between private line and message services through use of a ceiling rate. Telephone subscribers who make no use of the interstate network, however, would continue to pay nothing. Supporters of the Mixed 2 approach argued that this approach would resolve the bypass threat by greatly reducing the total bill paid by any large user, while continuing to allow small users and non-users to pay very little or nothing, maintaining universal service.[41]

117. We are convinced, however, that the Mixed 2 proposal, as described in the *Fourth Supplemental Notice*, is unworkable. The distribution of interstate calls by subscribers is highly skewed. A substantial portion of total callers make no calls in any given month. Under the Mixed 2 approach, such users would pay nothing. Heavy users are currently a small fraction of total users, but make a large majority of total calls. Such users would be protected by the maximum charge. The Mixed 2 approach, however, does not alter total revenue requirements. The costs allocated to the interstate jurisdiction are unlikely to fall as a result of the Mixed 2 approach. To recover revenue requirements, access tariffs would have to levy heavy usage charges on moderate users. These charges could be far in excess of the current payments. This approach could result in an inefficient and undesirable increase in the number of subscribers who make no interstate calls. As a result, telephone companies could

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[40] *See, e.g.*, Comments of Ad Hoc Telecommunications Users; Aeronautical Radio, Inc.; AT&T/BOCs; First Data Resources; GTE; IBM; Kansas Public Service Commission; NTIA; Pennsylvania PUC.

[41] *See, e.g.*, Comments of Rural Electrification Administration, Virginia Corporation Commission.

find themselves unable to devise charges to meet their authorized revenue requirements. For these reasons, we conclude that the Mixed 2 approach is inappropriate.

118. Proponents of the Pure 2 approach[42] argue that Pure 2 corresponds with economic cost causation and that only the Pure 2 approach can eliminate bypass, encourage efficient use of the national telecommunications network, and be sustained in a competitive environment. Pure 2 would also resolve the discrimination between private line and message service, a fundamental objective of this proceeding. It would do so by charging all users in the same way. Only costs that vary on a usage basis would be recovered on a usage basis. Costs imposed on a non-usage basis would be recovered on a non-usage basis.

119. The majority of those commenting supported the Pure 2 option for the same reasons they found both the Pure 1 and Mixed 1 schemes objectionable.[43] They assert that the Pure 2 approach would enhance network efficiency in at least two ways. First, since under this plan charges would reflect costs, they claim that Pure 2 would eliminate uneconomic bypass. Only these alternative technologies that have real advantages over the telephone network would survive. Second, usage based rates could fall substantially since such rates would no longer recover NTS costs. As a result, telephone users would no longer artificially restrain their calling. Users could weigh the price of a call against the benefit that they would receive from a call, and would make that call whenever the value of the call is at least equal to its cost.

120. Opponents of the Pure 2 approach[44] make two arguments. First, some contended that we could not lawfully impose charges on end users. Access charges, they argue, must be paid from interstate carriers to exchange carriers. In the alternative, some argued that we could not impose charges on subscribers who make no interstate calls. Second, many argued that even if we could impose such a charge we should not. It was argued that Pure 2 would constitute a

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[42] Proponents of the Pure 2 approach include ABC/CBS/NBC; Ad Hoc TeleCommunications Uers Committee; Aeronautical Radio; Association of Long Distance Telephone Companies; AT&T/BOCs; Business Telecommunications Corporation; Department of Justice (in reply comments); First Data Resources; GTE; IBM; MCI; Rochester Tel; SNET; SPC; Tel. Systems Management Corp., *et al.*; US Tel; USTS; Western Union.

[43] AT&T and many other telephone companies that had supported the tentative plan in their comments filed in response to the *Second Supplemental Notice*, reversed their earlier position and agreed with heavy users that Pure 1 is an invitation to bypass.

[44] Those arguing against the Pure 2 approach include the California PUC; Consumers Union, *et al.*; Florida PSC; Haviland Telephone *et al.*; Michigan PSC staff; NARUC; National Association of State Utility Consumer advocates; North Dakota PSC; Rural Electrification Administration; Washington UTC; Wisconsin PSC.

substantial step away from universal service since many users would be unable or unwilling to pay the flat fee for interstate access. Further, it was argued that the Pure 2 approach could lead to the loss of nationwide rate averaging. These drawbacks, it was felt, would be particularly severe in high cost rural areas. Some of these considerations have led us to reject the Pure 2 approach.

121. We reject the notion that we cannot impose a flat fee on subscribers, or that a subscriber must make interstate calls before a subscriber can be assessed such a charge. A subscriber who obtains a line to a local dial switch or a manual switchboard necessarily obtains access to interstate as well as local services. The cost of that access has traditionally been described as non-traffic sensitive because such costs do not vary with usage. A subscriber who does not use the subscriber line to place or receive calls imposes the same NTS costs as a subscriber who does use the line. A subscriber who does not make local calls would normally pay a flat fee for the exchange portion of such costs. Imposing a flat change for the interstate portion of those costs is equally reasonable. Any other procedure violates the general principle that costs should be recovered from the cost-causative ratepayer whenever it is possible to do so.[45]

122. We find more merit, however, in the second point raised by the opponents of Pure 2. We cannot ignore the problems which the implementation of Pure 2, especially its implementation on an immediate basis, would have upon universal service and rural subscribers. It has become quite clear to us that the major goals in this proceeding—the continued assurance of universal service; the elimination of unjust discrimination or unlawful preferential rates; the encouragement of network efficiency; and the prevention of uneconomic bypass—are to some extent conflicting and that there is no possibility of devising a "perfect" plan that would fully and immediately effectuate all of our goals. Rather, it has become clear that any acceptable plan must balance these goals in a satisfactory manner. For example, it would be unacceptable for the Commission to put a plan into effect that ameliorates existing efficiency, bypass and discrimination problems, but which, at the same time, had serious consequences for universal service.

123. Moreover, we recognize that the balance to be drawn is a very delicate one and that some adjustments may be necessary. For this reason, we have felt it necessary to move cautiously and have incorporated a transition period for our plan. We have also taken the special precaution of establishing a Universal Service Fund to

[45] *See Phase II Final Decision and Order in Docket 19129*, 64 FCC 2d 1 (1977); *see also First Report and Order in CC Docket 79-105*, (uniform system of accounts), 85 FCC 2d 818 (1981).

protect the needs of subscribers in rural or high costs areas. We now proceed in the succeeding sections to describe our plan.

B. *The Long Range Plan*

124. We are adopting a transition plan that will produce steps toward a rate structure that promotes optimal utilization of telecommunications facilities and a long range plan that will recover significant portions of NTS costs through flat charges that are collected from end users by exchange carriers. We believe it will be possible to achieve that result at the end of a transition period without jeopardizing universal service. We will, however, keep CC Docket 78–72 open in order to conduct a proceeding in the fifth year of the transition and to receive periodic or special reports during the course of the transition period that will enable this Commission to make any adjustments that might be necessary.

125. Although the long range NTS plan will not be fully effective until the 1990s, the total plan will probably be more understandable if we begin with a description of that plan. Under the long range plan, different charges will be assessed for the interstate use of lines that are also used for local exchange service and the use of lines that are dedicated to interstate service. The latter category includes interstate WATS access lines. It also includes all private lines, including closed end FX or CCSA lines, that terminate in a PBX, key system, or other customer premises equipment that is not used exclusively for a particular interstate service.

126. The charges for the line that is commonly used for multiple services will reflect the interstate portion of investment in that line, associated NTS plant, and other investment and expenses that are attributed to that element. We will call these the "Common Line" charges. The charge for the other category, which we will call "Dedicated Access Line", will inevitably be higher because it will reflect the total or unseparated cost of these facilities.[46]

127. We have made some revisions in the existing cost allocations to reflect private line usage of certain station equipment that is in fact jointly used by common line users and users of any private line that terminates in a PBX or similar equipment. Such jointly used equipment is apportioned to MTS and WATS under the current cost apportionment procedures. We are also apportioning a pro rata share of investment in unused or reserve lines to the Dedicated Access Line element. These changes will correct anomalies in the existing cost apportionment methods that impose an unfair burden upon MTS customers. We have decided to refrain from apportioning costs to a private line category as a surrogate for a leaky PBX charge

[46] Although we are describing this element as the "Dedicated Access Line" element, it does not include all lines that are dedicated to interstate services. Some of those lines or portions of such lines are included in the Special Access and Dedicated Transport elements.

as proposed in the *Second Supplemental Notice*. 77 FCC 2d at 241. This problem is likely to become much less significant in the future because the access charge plan will remove much of the incentive for substituting private line service for MTS. Moreover, any remaining inequity will be at least roughly balanced by the assignment of investment in unused lines to the Dedicated Access Line element on the basis of relative use. An apportionment that was based upon projected use would probably apportion a smaller portion of that investment to the Dedicated Access Line element because common line use is likely to grow at a faster rate than private line use in the future.

128. We are also establishing a third NTS category for pay telephones. Although the NTS costs associated with pay telephone calls do represent fixed costs, it would be impossible to recover such costs through flat rates. We are accordingly prescribing usage charges that will be collected from end users when an interstate or international call is made from a pay telephone. We will call this element the Pay Telephone element.

129. We have also decided that a portion of the common line revenue requirement should be recovered through a carrier's carrier charge. At the present time most interstate common line costs are reflected in nationally averaged MTS and WATS rates, but the compensation that exchange carriers receive through the settlements and divisions of revenues process reflects the actual costs of each carrier that participates in the pool arrangement.[47] When we adopted the *Second Supplemental Notice* we assumed that we could eliminate discrimination and preferences in end user rates for interstate services without drastically altering the telephone industry's voluntary pooling arrangement. We accordingly proposed to establish carrier's carrier access charges that would be uniform in all exchanges of all carriers and proposed that access charge revenues be pooled in essentially the same manner that MTS and WATS revenues are pooled now.[48]

130. Although some comments that were filed in response to the *Second Supplemental Notice* questioned the desirability of uniform access charges with pooling, comments from both large and small telephone companies generally supported that proposal. None of the telephone companies indicated that it would not wish to be included in any such arrangement.

131. After the settlement of the AT&T antitrust case was announced, we recognized that it would probably be necessary to create different arrangements for the preparation of any common

[47] That arrangement is described in the *Second Supplemental Notice*. *See* 77 FCC 2d at 226-228.

[48] The pool we proposed at that time would have differed from the settlements/divisions pool in some respects. *Id.* at 238-239.

tariffs and the administration of any revenue pools. The *Fourth Supplemental Notice* invited comment upon a proposal to create an association to perform administrative functions that AT&T would have performed under the tentative plan in the *Second Supplemental Notice*. The *Fourth Supplemental Notice* also invited further comments upon some possible alternatives to nationwide averaging of access charges.

132. The most recent comments demonstrate that the telephone industry consensus no longer exists. The AT&T comments indicate that the BOCs do not wish to participate in common access tariffs or access revenue pools. Rochester, Continental and Centel have also indicated that they do not wish to participate in such arrangements. Many telephone companies and others have argued that nationwide averaging of access charges should be maintained. Some contend that nationwide averaging with pooling is essential to avoid severe hardships for some subscribers.[49] Such national averaging would allow below cost rates in high cost rural areas with attendant gains in universal service. Opponents of nationwide averaging argue that averaging results in a deviation of costs from rates and the prospect of inefficient use of the network.[50] Some contend that averaging might also have an undesirable effect on incentives to contain costs.[51] Uniform rates also limit a carrier's flexibility to meet unique circumstances, such as an unusual threat of uneconomic bypass or a reduction in universal service in the area served by a particular carrier. If we adopt rules that require every carrier to follow the same path, we will be hardpressed to satisfy legitimate needs of companies that require more rapid movement toward cost-based pricing and those companies that require a more gradual transition.

133. For reasons that are explained more fully in Part VI, we have decided that we should not require every exchange carrier to participate in common tariffs for all access elements. We have also concluded that some adjustment in flat end user common line access charges must be made in order to balance the critical need to move towards a rational cost-based pricing system for access plant with the maintenance of universal service. We do not anticipate that end user rates will ever reflect the full common line NTS costs of the highest cost carriers.

134. Costs of different local exchange carriers do vary. Many of these cost variations are attributable to factors that carrier management cannot control. The Docket 80–286 Joint Board has tentatively

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[49] *See especially*, Haviland Telephone Company, p. 7; Ketchikan Public Utilities, p. 2; Michigan Action Groups, p. 6; Rural Telephone Coalition, p. 14; REA, p. 6; Curtis M. Bushnell, p. 2; First Data Resources Reply, p. 16; NARUC Reply, p. 2.

[50] *See, e.g.*, comments of AT&T; Centel; Continental Telecom; GTE (in the future); NTIA; Rochester Telephone; SNET; Cincinnati Bell; USTS; Vermont PSB; Western Union.

[51] *See especially* Rochester Telephone, p. 34.

endorsed an industry proposal to include a high cost factor in any new separations formula for the apportionment of NTS plant. *Joint Board Order*, *supra*, 47 Fed. Reg. at 54485. Such a factor would represent a percentage of the NTS costs of high cost companies that would be added to a base factor percentage to determine the portion of such a company's NTS costs that would be allocated to the interstate jurisdiction. Such a percentage factor would necessarily take into account any increasing cost pressures caused by inflation or other factors. The high cost factor would promote or preserve universal service by enabling high cost companies to establish local exchange rates that do not substantially exceed rates charged by other companies. In view of the purpose such a factor would serve, we will describe it as a universal service factor in this *Report and Order*. Revenues attributable to the universal service factor will be described as the Universal Service Fund.

135. The purpose that the Universal Service Fund would be designed to serve would obviously be frustrated if all NTS costs were recovered through end user charges that reflect the interstate NTS costs of a particular exchange carrier. Any reduction in the local exchange rates of such a carrier would be offset by increased end user access charges. We have accordingly decided that common line costs that are assigned to the interstate jurisdiction as a result of the application of a universal service factor should be recovered through an access charge that is assessed upon interexchange carriers.

136. Many parties have called for the creation of a "life line" exception to any mandatory flat customer access charge. Life line services have been introduced in a considerable number of state jurisdictions. Such rates have not always provided benefits to the class of users who are the intended beneficiaries.

137. We are, nevertheless, prepared to entertain waiver requests from carriers who wish to provide "life line" options under the following circumstances. First, any such waiver request should state with specificity the terms and conditions which apply to life line service. Second, such waiver requests must specify the revenues which would be lost were such a life line option to be instituted. Third, such waiver requests must specify the specific adjustment to the customer access charge tariff which has been made to secure the revenues lost through the life line option. During the transition period these measures may be either an increase in the minimum flat rates or an increase in the usage charge imposed upon customers for access service. An increase in the transitional maximum charge will not be permitted. Of course, states continue to have full authority to modify existing life line rates for local exchange telephone service or to institute such rates should they believe it is necessary to ameliorate the effects of interstate access charges.

C. *The Transitional Plan for Carrier Common Line Charges*

138. Although we expect that revenues from the Carrier Common Line element will eventually be limited to the Universal Service Fund portion of the Common Line revenue requirement, substantial additional amounts must be included in that carrier's carrier charge during an interim period to avoid anomalous results that would occur if deaveraged end user rates for all other Common Line costs were implemented in 1984.

139. We have recently adopted a change in jurisdictional separations rules that will accomplish the phased removal of CPE from the interstate rate base. We decided to implement that aspect of our decision in *Second Computer Inquiry, supra*, in that manner in order to avoid an abrupt increase in local exchange rates that would result if the interstate CPE allocation were removed on a flash cut basis. The Joint Board has recently invited comment upon an alternative formula that will achieve the same results even if the divested BOCs do not have any CPE to allocate after the divestiture occurs.[52]

140. The purposes of the phased removal of CPE or the allocation of surrogate CPE costs would be frustrated if costs assigned to the interstate jurisdiction to limit increases in local exchange service rates were added to end user access charges. Such a cost assignment could have the same effect upon end users as a local rate increase. In these circumstances, we have concluded that it would be more appropriate to recover such costs through a carrier's carrier charge. Since such costs will disappear four years after the access charges become effective, the exclusion of such costs from End User Common Line charges will avoid churning effects upon End User Common Line charges that could make the transition to a new rate structure unnecessarily difficult.

141. Similar considerations warrant the exclusion of inside wiring costs from End User Common Line charges. Inside wiring that was capitalized as investment before this Commission required the expensing of inside wiring is being amortized and will disappear from the rate base in the early 1990's. We are also considering proposals to remove expenses associated with the installation of new inside wiring from interstate rate computations.[53] It would be inappropriate to add such costs to new flat charges imposed upon end users in view of the uncertainties with respect to the future status of inside wiring. It would also be inappropriate to recover inside wiring or CPE costs through a per line charge because there is little or no

[52] The alternative formular is described in Part IV. D. of the *Joint Board Order.*

[53] *See Deregulation of Customer Premise Inside Wiring*, 86 FCC 2d 885 (1981); *Notice of Proposed Rulemaking*, (CC Docket No. 82–681), 47 Fed Reg. 44770 (October 12, 1982).

relationship between CPE or inside wiring costs of a particular subscriber and the number of loops used by that subscriber.

142. The present *Separations Manual* apportions NTS plant on the basis of a factor, which is called the Subscriber Plant Factor or SPF, that has been computed separately for each "study area." A study area normally means the area served by a particular telephone company within a particular state. The current factors differ widely from one study area to another and many companies that probably will not be classified as high cost companies have interstate NTS costs that are substantially higher than the national average because they happen to have a high interstate SPF. If deaveraged end user rates were implemented under the present circumstances, their customers would be subjected to excessive rate increases.

143. The Joint Board is presently considering a number of alternatives to the current factors that would not be likely to produce such results. Any new factor that differs significantly from an existing factor is, however, likely to be phased in over a transition period. In these circumstances common line costs other than Universal Service Fund (USF), CPE and inside wiring costs that exceed an appropriate cut-off will be assigned to the Carrier Common Line element for an interim period.[54]

144. An additional assignment to the Carrier Common Line element is also desirable to place some limit upon the flat end user charges that carriers would be permitted to adopt during the transition period for End User Common Line charges. In view of all of these considerations, we have decided that, in 1984, Common Line revenue requirements that exceed $4 per line per month should be allocated to the Carrier Common Line charges.

145. The rules we are adopting establish a five-year transition period for the elimination of Common Line costs other than USF, CPE and inside wiring costs from the pooled Carrier Common Line charges. Common Line costs other than USF, CPE and inside wiring could be described as the third component of a Common Line revenue requirement. This third component contains all the residual costs. For each local telephone company, this total residual amount is calculated as follows: Total interstate per line residual amount = total Common Line per line revenue requirement - $4. - (CPE + USF + Inside Wiring)

146. Over a five year period, the total residual amount is to be allocated annually between the End User Common Line charges and the Carrier Common Line charge under the following formula:

[54] *See* Subpart F of the rules.

Year	Carrier Contribution to total Residual amount	End User Contribution to total residual amount
1984	100%	0%
1985	80%	20%
1986	60%	40%
1987	40%	60%
1988	20%	80%
1989	0%	100%
1990	0%	100%

147. Thus, in the first year of the transition period these residual costs will be recovered fully through the Carrier Common Line charges imposed on all providers of interstate switched services. In the second year, only 80 percent of the residual costs for that year will be recovered from carriers, with 20 percent recovered from end users.

148. We recognize that end user charges constitute a substantial departure from the historic means of cost recovery. Exchange carriers are unfamiliar with this new system. Such carriers, especially small carriers that are unable to devote substantial resources to this task, might be subjected to unnecessary risks if forced to move immediately to full recovery of subscriber plant through subscriber charges. The Carrier Common Line charges, administered through the exchange carrier association, offer a limited degree of risk sharing and increased certainty to these exchange carriers in the early years of the new environment. The fairly rapid reduction of such charges through the transition appears likely to limit uneconomic bypass substantially during the transition to cost-based pricing.

149. The Carrier Common Line charge will also provide the mechanism to adjust the prices charged interexchange carriers for access to reflect differences in access quality. To achieve this result, we have required that the Carrier Common Line element be subdivided into two charges. The first charge, a usage charge, will be imposed upon all interexchange carriers. The second, a premium access charge, will be imposed upon only certain carriers described below.

1. *The Usage Charge*

150. This charge shall be calculated on a straightforward minutes of use basis for services using common lines (*e.g.*, MTS, WATS, FX, and OCC-ENFIA). This charge shall be levied on a nationwide equal per minute basis regardless of the costs of particular originating or terminating exchange carriers, the length of haul, or the rate charged by the interexchange carrier. An exchange carrier association, described in Part VI, shall be responsi-

ble for tariffing and collecting both the premium charge and this usage charge and distributing revenues to all participating carriers.

2. *The Premium Access Charge*

151. There is little disagreement that the quality of interconnection now received by the OCCs[55] through their ENFIA A arrangements is distinctly inferior to that received by the traditional interexchange partnership (predominantly AT&T). Indeed, it appears that the level of interconnection received by the OCCs even under ENFIA B and ENFIA C arrangements (if available) is inferior to that received by the partnership.[56] Such quality differences would give a substantial advantage to the carriers that offer MTS and WATS unless access pricing is adjusted to account for quality differences until equal interconnection is available to all interexchange carriers. It is not clear, however, that this inferior level of interconnection is any cheaper to provide. Cost-based pricing would appear to require that all carriers pay their full costs regardless of any quality differences.

152. Over the past several years, BOCs have been compensated for use of their facilities for OCC interconnection through the ENFIA tariff. That tariff provides a 45 percent discount from the "SEP" amount, *i.e.*, the amount that AT&T calculates that BOCs receive for exchange access through the division of revenue process. This arrangement is the result of compromise, and was adopted only as an interim measure, until the issues involved in this proceeding are solved and an access charge devised.

153. While the OCCs have generally sought a continued rate differential, few participants in this proceeding now assert that any differential should take the form of a "discount". Southern Pacific argues, however, that the existing OCC rate should not be described as a discount since the concept of discount implies that the same good is being provided. While we shall not dispute that definition of discount, cost-based pricing does not appear to allow non-cost based rates, including reductions below the cost of service, regardless of whether the service being provided is inferior to an equally costly service provided others. Instead of justifying an OCC discount, MCI claims, in reply comments, that an AT&T surcharge is appropriate.

154. If the type of access received by AT&T can be provided only to one carrier (at least in the short run), then even if it does not cost much to provide this access to that one carrier, this access has an

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[55] The term "Other Common Carriers" or "OCCs" is often used to describe carriers other than telephone companies. The term "OCC" is used in the context of this *Report and Order* to describe an interexchange carrier that offers an MTS/WATS equivalent service such as Execunet or SPRINT.

[56] ENFIA A provides interconnection to the line side of a Class 5 switch, ENFIA B provides interconnection to the trunk side of a Class 5 switch, and ENFIA C provides interconnection through a tandem switch.

"opportunity cost" that is equal to the amount that other carriers would be willing to pay for this preferred access. The cost of providing the favored carrier with this unique level of access includes the denial of this access to other carriers. Those carriers who receive the level of service that could be provided to any number of carriers would pay the full costs of this service. Carriers who receive the premium access service would pay the observable costs and an additional amount reflecting these opportunity costs. A surcharge for such premium access could theoretically be computed to reflect such opportunity costs, but it would probably be necessary to conduct an auction to determine the amount a carrier would pay for such premium access. We have decided that an auction would not be feasible. We will, however, assess a charge upon AT&T and its interexchange partners that will reflect an estimate of premium value. We will describe that charge as the premium access charge. We will not, however, permit exchange carriers to recover premium value in addition to a total revenue requirement that is computed in the usual manner. The premium access payments will be deducted from the Carrier Common Line revenue requirement in order to compute usage charges.

155. Revenues collected from the premium carrier need not flow to the exchange carrier having the greatest value of premium access. Indeed, if exchange carriers were able to levy premium access charges, such exchange carriers would have strong incentives to continue to offer preferential service for a longer period than would be necessary. We have concluded, therefore, that the premium charge should be levied by the exchange carrier association on a nationwide basis.

156. By September of 1986, the quality of interconnection generally available to OCCs will have to be far closer to the quality of access offered the premium carrier because of MFJ requirements. Even then, however, there will still be differences having potential advantages to a premium carrier, including the premium carrier's position as fallback carrier for current subscribers not specifying some other default carrier, and the continued unique premium access to nonelectronic and small switches. This residual premium access will have some value, but will have a value far smaller than is given by its present position. A decreasing surcharge is, therefore, appropriate.[57]

157. A premium charge might be levied as either a lump sum or a per minute charge. We have determined that a lump sum approach

[57] Nothing in the record causes us to expect any carrier other than the AT&T partnership will receive premium access. Improved access received by other carriers appears to reduce the value of AT&T's premium, but not to constitute a replacement of AT&T as the premium carrier. Our prescribing the gradual elimination of the premium access charge reflects our belief that exchange carriers will quickly move toward equal access.

serves the public interest. The value of premium access does not depend on the actual rate structure selected by the premium carrier or the usage generated through that rate structure. Rather, it depends on the value of premium access in its best alternative use. This value is constant without respect to the behavior of the particular carrier receiving premium access.

158. Thus, for example, the premium carrier may make investments to expand its network or reduce blockage in hopes of stimulating increased call volumes. If the premium charge were assessed on a usage basis, these investments might not be made even if they would redound to the benefit of the calling public. By levying a lump sum charge on the carrier receiving premium access, this distortion is avoided. The economic justification for a premium charge is, therefore, consistent with a lump sum charge rather than with a usage based premium charge.

159. We have invited proponents of a large or a small differential in the access compensation paid by OCCs and the telephone company partnership to submit a case for a particular differential both in this docket and in proceedings relating to the ENFIA agreement. Those participants have apparently been unable to produce submissions that have much evidentiary value. In these circumstances, we necessarily must exercise our best judgment to establish an appropriate premium amount.

160. The Element 3 discount in the ENFIA agreement was designed in part to reflect an estimate of the value of differences in access arrangements by the parties to that agreement, but that discount would not establish an appropriate 1984 premium even if that discount could be readily translated into a premium. We noted in *Extension of ENFIA Agreement*, *supra*, 90 FCC 2d at 16, that the formula for the computation of ENFIA charges was probably designed to produce a charge that would be higher than the FX Open End charge and lower than a charge that would replicate the compensation BOCs receive from the division of MTS revenues. This was apparently perceived to be necessary to achieve equity in view of access compensation disparities between MTS and FX.

161. The existence of those disparities was an important factor in our decision to extend the ENFIA agreement without altering the Element 3 discount factor. We said (*id.* at 16–17):

> We believe it is still reasonable to allow OCCs to pay charges that are lower than MTS/WATS access charges and higher than other access costs during the interim period. That interim period will, of course, end when access charges are established pursuant to the rules we are prescribing in CC Docket No. 78–72.

162. The access charge rules we are adopting do eliminate those disparities. We would have adopted a smaller discount factor when we extended the ENFIA agreement if that factor had been designed for the sole purpose of reflecting the value of qualitative differences

between ENFIA and MTS/WATS access. We would have made a further reduction in the ENFIA Element 3 discount if ENFIA element 2 had been computed to reflect differences in switching costs that will be reflected in our rules for the computation of charges for the Local Switching element. See Part IV.A, *infra*. A smaller premium is also necessary because OCCs will be receiving some access before and during 1984 that is better than the ENFIA A arrangements that existed at the time the ENFIA agreement was negotiated. Nothing has occurred during the years since the ENFIA agreement was signed that would indicate that the parties to the ENFIA agreement overestimated the value of the qualitative differences in OCC and partnership access arrangements. Therefore, the 1984 premium should be smaller than an amount that would replicate the present ENFIA discount.

163. Nevertheless, a substantial premium access assessment is required in 1984 because significant disparities in the quality of access will exist during that year. Those disparities will continue to provide AT&T with a significant competitive advantage.

164. Although we have not approved a differential in access compensation to provide artificial advantages for new competitors, we are, of course, mindful of the adverse effect than an abrupt elimination of access compensation disparities could have upon competition under existing conditions of unequal interconnection. In view of the uncertainties with respect to the magnitude of premium access value and the future progress to equal access, we have decided that a phased elimination of the access compensation differential is justified in order to encourage full and fair competition. That course is consistent with our determination in this proceeding that a competitive interexchange market will produce significant public benefits.

165. We have decided to implement that decision by using the dollar amount of the interstate CPE costs or surrogate CPE costs of all local exchange carriers to determine the premium access assessment.

166. Those costs have been fixed through our decision to remove a base amount from the interstate rate base during a five year transition period that begins in 1983. Thus, the interstate CPE costs will be declining at the rate of 25% per year during the first years that access charges are in effect. Disparities in the quality of access arrangements for OCCs and premium carriers will be phased out during approximately the same time frame.

167. We also believe that 1984 interstate CPE costs, which we estimate to be about $1.4 billion, will correspond with our present estimate of 1984 premium access value. Such an assessment will be substantial and is likely to be significantly smaller than an assessment that would replicate the ENFIA A Element 3 discount. The use of CPE costs also serves administrative convenience.

168. We cannot, however, be certain that the decline in the premium value will correspond to the decline in CPE costs. We have accordingly described the CPE costs as a default formula for the computation of the premium in the access charge rules. Section 69.207 of the Rules says that premium access shall be equal to a CPE or CPE surrogate revenue requirement "[i]n the absence of a Commission order designating the premium access portion . . ." We do not intend to designate a different amount for the 1984 premium assessment, but we may designate a different amount in subsequent years if we have reason to believe that premium value is declining at a much faster or slower rate than the interstate CPE costs.

D. *Transitional End User Common Line Charges*

169. Although the allocation of Common Line costs to Carrier Common Line charges should be sufficient to offset anomalies that could result from the application of transitional separations factors, this would not be sufficient to avoid the disruptive effects of immediate implementation of flat charges for the entire end user portion. The introduction of a $4 per month per line charge for residential end users on a flash cut basis could create an undue risk that a number of residential users would choose to cancel local exchange service.[58]

170. As we noted in the *Fourth Supplemental Notice*, we are quite concerned about the impact of flat charges for NTS costs, and especially a sudden shift to flat charges, on small users and on subscribers in high cost areas. Despite the attractiveness of such flat charges from the standpoint of economic efficiency, we are unwilling to require immediate implementation of flat charges for the entire end user portion. The guidelines that we adopt, however, constitute a gradual transition to a new approach to compensation for interstate access that balances the goals of the Communications Act in a manner that best serves the public interest.

171. Many participants who found at least some flat charges acceptable or desirable argue that a transition period is appropriate.[59] Such a transition would allow subscribers and telephone companies the opportunity to adjust to the new environment. Other participants take the opposite view that a flash-cut approach would be most appropriate.[60] Such a flash cut would allow cost-based pricing immediately to go into effect and confer the economic advantages of flat charges that much earlier.

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[58] Possible effects of access charges upon the universality of service are discussed in Appendix G.

[59] *See, e.g.*, Comments of Ad Hoc Telecommunications User's Committee; AT&T; MCI; NTIA; Pennsylvania PUC; SNET; SPCC; United Telephone System, Inc.; USITA; U.S. Tel.; Vermont PSB.

[60] *See, e.g.*, Comments of Aeronautical Radio, Inc.; GTE; Rochester Tel; Tel. Systems Management Corp., *et. al.*

172. We have concluded that a transition to the flat End User Common Line charge we require is appropriate. A gradual transition allows a more comfortable adjustment to the new economic realities. If the timing of the transition is known, the dynamic efficiency losses that result from failing immediately to move will be small. The extremely long transition advocated by MCI appears unnecessary.

173. The gradual transition we are adopting has several advantages that, we believe, will outweigh any drawbacks. First, it establishes a schedule for movement to a cost-based access arrangement over a medium length period. Companies that have invested heavily in technologies made economic only by the continuance of uneconomic and non-cost based prices will have several years in which to amortize these investments. A pre-set transition will encourage investors to target new investments on technologies that are consistent with the underlying costs of the network and hence on the most efficient possible use of the nationwide telecommunications system.

174. A pre-set transition plan like the one we are adopting has the advantage of providing some certainty to those who must make investments in communications technologies. A fairly rapid movement toward cost-based pricing can allow time for corrections in past investment, yet new investments would be made with the forthcoming prices in mind. It appears unlikely that any company would spend the thousands or even millions of dollars necessary to take advantage of the variance between price and cost during the transition if it understands that the gap is to be reduced year by year, until it is completely eliminated at the end of a mid-length transition period. Thus, while the transition plan incorporates some features in the Mixed 2 plan in the *Fourth Supplemental Notice*, it will not have the fundamental flaw that the maximum rate must remain many times higher than cost.

175. We believe that a more lengthy transition would unnecessarily delay the advantages of cost based rates and might encourage unnecessary bypass and inefficient development of the economy. While the seven-year transition plan we have adopted might appear unnecessarily slow to some users and exchange carriers, the flexibility it provides will allow those carriers who feel compelled to move rapidly the opportunity to do so, while not forcing all carriers to adjust at this same pace. The details of the transition plan are explained in the next subpart and in Subpart C of the access charge rules.

E. *End User Common Line Rate Structure*

1. *The Minimum Change.*

176. As we have already indicated, the End User Common Line charges will meet an increasing share of total NTS costs assigned to

the interstate jurisdiction. This element, combined with the Carrier Common Line charges, will recover most of the costs of subscriber plant, including CPE, inside wire, outside wire (*i.e.*, the drop line and interface) and loop costs allocated to the interstate jurisdiction. All of these costs are non-traffic sensitive and, for the most part, are dedicated to particular consumers. (Only party line loops and any investment associated with coin phones are non-dedicated.)

177. During the transition period for End User Common Line charges we shall require that the access tariff include a minimum flat fee of at least two dollars per month for each residential common line. This payment shall be imposed regardless of whether the particular customer makes or receives any interstate calls. The minimum business line customer charge shall be four dollars per common line loop per month. The difference in these charges should reflect the typically higher interstate revenue requirement generated by business lines as compared to residential lines. In addition, we believe that this differential should reduce the incentive a business subscriber might have to use its dedicated facilities in a way calculated to reduce the usage sensitive portion of its access charge, solely to escape usage payments.

178. We also believe that a differential in the transitional minimum charges for business and residential customers is justified because we have selected a low residential minimum in order to avoid an adverse effect upon universal service. Minimum charges for business customers are unlikely to have any meaningful effect upon universal service because demand for business local exchange service -at least for a single line- tends to be inelastic. We have, however, concluded that some limitations should be imposed upon carrier discretion to select a higher minimum rate. Section 69.203 of our Rules precludes any carrier from establishing a business minimum charge that is more than 200% of the residential minimum charge.

2. *The Usage Charge*

179. The difference between the minimum flat fee (which must be at least two dollars per month per line for residence and four dollars per month per line for business) and the total revenue requirement associated with the end user charge (four dollars per month per line in the first year and increasing amounts in later years) may be recovered through a usage charge, up to a maximum.

180. Traditionally usage has been measured on the basis of minutes of use. The *Fourth Supplemental Notice* had suggested that a per call (rather than per minute) usage measure might be more appropriate for any usage component in the end user access charge. Because nontraffic sensitive costs do not vary with minutes or number of calls, we find neither of these approaches to be clearly superior in all cases. The selection should be based on which will lead to the smaller distortion in usage patterns.

181. Charging users on a per minute basis will encourage users to make shorter calls than they would under efficient pricing. Charging users on a per call basis would encourage them to make fewer and longer calls. Once customers make a call they would have an incentive to communicate as long as efficient, but this efficiency gain must be evaluated against the efficiency loss of fewer calls.

182. The selection of a measure of usage should be based on relative elasticities of demand.[61] If most short calls are made to convey pressing information, the per call charge would not discourage too many callers and this alternative would be desirable. If this is not the case and customers would be willing to make fewer calls or take advantage of patterned calling (*e.g.*, making collect or person-to-person calls that are designed to be refused but to convey information in the request), the per minute option would be preferable. Either a per call or a per minute charge could be used as a valuable component in our transitional plan. Such a charge could be set in order to recover revenue directly from end users (rather than carriers) while prolonging the period before all rates are set on a flat basis. In the *Fourth Supplemental Notice*, we expressed our belief that the elasticity and measurement cost conditions might warrant a per call charge. Several of the comments suggest that under a Mixed 2 option the per call fee would be so high that it would discourage large numbers of calls, and that a per minute charge would be more appropriate. Under the rate structure we have prescribed the per minute or per call charge would be substantially lower than would be necessary under a zero-based Mixed 2 option. We have concluded, however, that the selection of a measure of usage should be left to the exchange carriers. It is certainly possible that different carriers may face customer demands of varying elasticities. The choice that is appropriate for some may be inappropriate for others.

3. *The Maximum Charge*

183. Because common lines are similar to dedicated interstate lines, we shall require that the maximum collected on any such line through end user charges (the sum of the minimum and any usage payment) be less than or equal to the rate established for dedicated access lines. Throughout the transition period we shall require that no one customer be charged in excess of a pre-set maximum. To eliminate unlawful discrimination among services, the maximum should be no more than the rate that a customer would pay as an end user Dedicated Access Line charge.[62] In special cases, however, we

[61] For a discussion of how relative elasticities of demand are related to cost recovery, *see* W.J. Baumol and D. Bradford, "Optimal Departures from Marginal Cost Pricing," American Economic Review, vol. 60, pp. 265–283, June, 1970.

[62] *See* Section 69.205 of the rules for a description of the computation of maximum rates in each transition year.

may allow local companies facing hardship in meeting our requirements to raise the maximum and the rate charged for the Dedicated Access Line element above the Dedicated Access Line per line cost. Such an exception would be allowed only as a temporary expedient in the early years of the transition.

184. In each of the five years subsequent to the introduction of the access charge, the maximum allowed each carrier shall be reduced by 10 percent, but shall never fall below total interstate costs. The exchange carrier or the exchange carrier association may adjust either the minimum, usage component, or both to recover revenue. At the end of the five year transition period, the highest maximum allowed would be reduced to 50 percent of its initial level and all Common Line costs, other than the Universal Service Fund and inside wiring costs would be recovered directly from end users.

185. For the last two years of the seven year transition period, we shall allow exchange carriers to continue to recover their End User Common Line revenue requirement through such a combination of flat fee minimum charges and usage charges with the pre-set maximum. Exchange carriers facing substantial bypass threat may wish to introduce flat rate pricing for recovery of all End User Common Line costs early in the transition period. In areas where bypass is a smaller threat, the more gradual transition permitted by continuing to allow usage recovery (to a maximum) appears to have benefits that outweigh the costs.

186. A maximum End User Common Line charge that is no greater than the price paid for a dedicated interstate loop (such as that associated with a closed end WATS line) or an interstate closed end FX line will allow heavy users to make a more rational choice among private line, MTS, WATS or FX service. It would resolve fundamental problems facing this Commission in this and other proceedings. The maximum is also desirable in its own right to reduce the threat of bypass. Since a substantial share of non-traffic sensitive costs is to be assigned to the End User Common Line element and recovered through minimum and maximum charges, the portion of NTS costs recovered in usage sensitive interstate rates will be substantially reduced. Heavy users, therefore, will find message rates that are dramatically reduced toward costs and would find bypass a less desirable option. The expectation of further reductions in both the maximum and the usage charge will further reduce the dangers of uneconomic bypass.

187. Generally, the usage charges will be imposed upon originating callers. We find, however, that it would be inappropriate to assess a usage charge upon the originating caller for certain calls that have traditionally been charged to the recipient. These include collect MTS calls, IN-WATS calls, and calls to an FX or CCSA subscriber that originate at the open end. The purposes that these

services were designed to serve would be frustrated if usage charges were assessed to the originating caller.

188. It would be difficult to assess such usage charges directly to the party who receives the call because that end user will normally be served by a different local exchange carrier. We have, therefore, decided to impose a charge upon the interexchange carriers that provide such services as a surrogate for a usage charge upon the recipient of the call. Such surrogate charges will, of course, be reflected in the interexchange carrier's charges to recipients in a manner that indirectly recovers appropriate costs from such recipients.

189. We have described this surrogate charge as a "transitional surcharge" in our Rules. Section 69.206 of the Rules describes the formula for computing the transitional surcharges. Although the transitional surcharge will be a carrier's carrier charge, it is an integral part of the transition plan for End User Common Line charges. Transitional surcharge revenues will be deducted from the End User Common Line revenue requirement in order to compute the usage charges that are assessed directly to end users.

190. As ENFIA A access is currently provided, it is difficult for some exchange companies to attribute usage to originating customers. It might appear difficult, therefore, to apply the usage sensitive charges and the maximum charge to these services. One solution is to develop a surrogate charge for these services. We believe, however, that coordination of billing between the exchange carrier and the interexchange carrier offering ENFIA A service is more desirable, efficient, and non-discriminatory.

191. In this *Report and Order* we require local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any. *See* Part IV. C, *infra*. We anticipate that the OCCs will take advantage of exchange carrier billing services and will submit their calling records to the exchange carriers doing the billing. The exchange carriers can, and are expected to, compare the identities of ENFIA A or C callers with their own subscriber rolls, coordinate calls and callers made over ENFIA A or C lines with calls made over other types of interconnection, and bill the end user with a usage charge appropriate for the totality of interstate calls made. If OCCs take advantage of exchange carrier billing services, or if ENFIA A or C minutes can be attributed to end users without this service, no surrogate charge is necessary.[63]

192. So long as the maximum End User Common Line charge differs from the minimum, we must deal with the incentives that

[63] We are not including such a surrogate charge in the rules we are adopting, but will consider waiver petitions to permit such surrogate ENFIA A charges if a carrier demonstrates that it would not be feasible to collect the charges from end users. We would expect a strong showing that alternative methods are not feasible.

might encourage heavy use of one line for interstate and other lines for local or intrastate toll calling. We have considered two options. First, all users, business or residential, could be required to pay the maximum for all lines in addition to their first line. Alternatively, total usage could be aggregated and divided over total lines regardless of use.

193. Transitional issues become important in making that choice. While such users should not expect to be subsidized in the long run, it might be unjust and inefficient to require them to pay high rates if they made their original investments in good faith and with the expectation that the current pricing structure would continue. Furthermore, the number of lines is likely to be a very poor proxy for ability to pay. Such users appear entitled to the benefits of a transition.

194. We, therefore, shall require customers having multiple lines to pay as if their calling had been spread evenly over all of their lines. Because the total usage of all of these phones is aggregated, customers would have no incentive to load all interstate calling inefficiently on any one line. Moreover, the transition plan will tend to limit the willingness of any user to distort investment strategies in response to differences in single line and multiline rates.

F. *Monitoring of the Effects of End User Charges*

195. We are well aware that the plan we adopt today constitutes a significant departure from interstate pricing approaches developed in a monopoly environment. We are totally committed to insure that this approach does not lead to a disruption of our nation's telecommunications system or to the elimination of universal service. That commitment is reflected in our decision to exclude Universal Service Fund costs from end user charges before and after the transition periods that are described in this *Report and Order.* That commitment is also reflected in our decision to conduct another notice-and-comment phase of this docket before taking the final steps in the transition to flat rate end user charges.

196. In view of the importance that we attach to the universal service objective, we have decided that this Commission should also monitor the effects of the implementation of end user access charges during the transition period. We are accordingly directing the Common Carrier Bureau to develop and present to us a monitoring system designed to insure that any developments based upon our access charge plan which threaten the "universal" character of service are brought to our attention in sufficient time for us to be able to take ameliorative action. We further direct that such a plan be in place on or before January 1, 1984, the date of institution of access charges. This monitoring plan should be designed to place as little a burden as possible upon the small businesses which constitute the overwhelming majority of our nation's telephone systems.

The Common Carrier Bureau is directed to present to us within 90 days of the release of this *Report and Order* its proposal for such a monitoring program.

IV. *GUIDELINES FOR RECOVERY OF TRAFFIC SENSITIVE COSTS*

197. In the *Second Supplemental Notice* we presented a plan to prescribe access charges for four categories of interstate service: MTS/WATS; FX/CCSA open-end access; private line; and OCC-ENFIA. Because it would have included toll connecting trunks which did not carry exchange traffic, we rejected the definition of "exchange circuit plant" appearing in the *Separations Manual* as a basis for defining the investment to be included in the access revenue requirement. Instead, in order to determine the investment that would be allocated to exchange access services, we defined "exchange plant" as plant used to furnish both toll and local service. Investment in other plant, called interexchange plant, would be excluded from the access revenue requirement. 77 FCC 2d at 239-240.

198. We had proposed that investment in exchange trunk outside plant (OSP) used jointly for exchange and toll message service (exchange trunk OSP in Category 1.22) and related exchange trunk circuit equipment (central office equipment in Category 8.12) be distributed among the three message service categories on the basis of minutes of use. Investment in exchange plant used for private line services and related equipment was to be directly assigned to the private line category. (OSP linking end offices and toll offices, however, was to be excluded and considered interexchange plant.)

199. Investment in traffic sensitive Category 6 central office equipment (local dial switching equipment) was to be distributed among the message access service categories (MTS/WATS; OCC-ENFIA, and FX/CCSA) on the basis of relative dial equipment minutes (DEMs), except for that portion directly assigned to private line services like CCSA. We proposed to rely on the factors specified in the *Separations Manual* for allocating investment in other traffic sensitive plant among the four access service categories. Direct investment in traffic sensitive equipment unrelated to OCC exchange access, however, was to be excluded from exchange plant. If *Manual* factors could not be used, we proposed at least to rely upon *Manual* principles or, alternatively, relative minutes of use to distribute the cost of the remaining traffic sensitive plant among the service categories.

200. Because the costs and revenues associated with interstate FX and CCSA open-end access services have been treated as intrastate, we found it necessary to adjust the revenue requirement for each access service category to reflect a credit to the FX/CCSA

category. Only in this way could we prevent a double charge to users of this interstate service. By the time our access charge plan is implemented, however, we expect that the *Separations Manual* will be revised. We note that the Joint Board has unanimously proposed that the investment, expenses and revenue attributable to interstate FX and CCSA open-end access services be treated as interstate costs and revenues. [64] Thus, when the access charge tariff replaces the intrastate tariff for these services, there should be no need to make the proposed credit adjustment.

201. To compute the access charge for each message service, we proposed that its revenue requirement be divided by total holding qtime minutes of use for that category to obtain a charge per holding time minute of use. An interstate carrier using that message access service would then pay the local carrier an amount equal to the product of that unit charge and that carrier's holding time minutes of use.

202. The MFJ is, of course, a supervening event that occurred since we released the *Second Supplemental Notice.* The MFJ not only requires AT&T's divestiture of the BOCs, but also imposes upon the BOCs the obligation to provide exchange access to all interexchange carriers equal in price and quality to that provided to AT&T. Recognizing that facilities to provide such access do not presently exist, the MFJ sets a timetable for phasing in the required equal access. Each BOC must begin to offer such access to all interexchange carriers no later than September 1, 1984.[65] BOCs must file tariffs (to be effective on the date of divestiture) which will govern BOC provision of exchange access to all interexchange carriers.

203. Tariffs described in the MFJ must meet the following general criteria:

(1) that they provide unbundled schedules of charges for all exchange access services, including those provided to AT&T (MFJ, App. B, Section B, para. 1);

(2) that they discriminate against no carrier or other customer (MFJ, App. B, Section B, para. 1);

(3) that they require interexchange carriers to pay only for the

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[64] *See Joint Board Order, supra,* 47 Fed. Reg. at 54495.

[65] By September 1, 1985, equal access must be available through end offices serving at least one-third of the BOC's exchange access lines. Unless a BOC obtains a waiver of the schedule requirements, equal access through each of its end offices must be available by September 1, 1986. Such a waiver is available only for end offices using electromechanical switches or serving fewer than 10,000 access lines. To receive the waiver, the BOC must show the Court that for particular categories of service the cost of equal access through such end offices outweighs the potential benefits to users of telecommunications services. Any denial of access based on this exception must be minimized both to its extent and duration. *See MFJ,* App. B, Section A, para. 3.

type of access they use (i.e., no "take it or leave it" bundling of services) (MFJ, App. B, Section B, para. 2);[66]

(4) that their charge for each type of exchange access must be cost justified (MFJ, App. B, Section B, para. 2).[67]

204. The MFJ defines "exchange access" to include any activity or function that a BOC performs in connection with the origination or termination of interexchange telecommunications. The judgment envisions a tariffed "menu" of such services from which an interexchange carrier may select the options it wants. It expects that each BOC will unbundle the rates for as many of these services or functions as technology will permit. The goal of this requirement is to give an interexchange carrier maximum flexibility in requesting and paying for the precise type of exchange access it requires.

205. As the Competitive Impact Statement prepared by the Department of Justice makes clear,[68] the MFJ does not purport to prevent the Commission from prescribing access charges to recover BOC costs allocated to exchange access by jurisdictional separations that do not satisfy all the conditions imposed by the MFJ upon carrier initiated tariffs. Its intent is only to require that, given the Commission's ground rules, the BOCs use a cost-based tariff structure, non-discriminatory in effect, to differentiate among the access charges they levy for each element of service.[69]

206. In the *Second Supplemental Notice*, we had concluded that the only way to eliminate the discrimination among interstate and foreign services was to develop "new allocation procedures in which formulae would be applied uniformly for all services to those plant elements which are used in basically the same way by all services and applied selectively to specific services for those plant elements which are used differently for different services." 77 FCC 2d at 231. Thus, the general criteria that the MFJ imposes upon BOC initiated access charges are fundamentally consistent with the goals of this proceeding. The MFJ, however, would include in access charges compensation for the use of facilities and services that our tentative plan had excluded from its definition of access services. In the *Fourth Supplemental Notice* we noted that while the BOCs could comply with MFJ requirements by filing supplemental charges for elements excluded from our rules for computing access charges, it

[66] Nothing in the decree precludes a BOC from also offering exchange access superior or inferior in type or quality to that provided AT&T at charges reflecting the increased or reduced cost of access.

[67] This means that differences in charges must be justified on the basis of differences in services.

[68] *See* Competitive Impact Statement filed by United States Department of Justice at 35-36, United States v. American Telephone and Telegraph Co., D.D.C. Civil Action No. 74-169.

[69] An antitrust decree could not, of course, limit this Commission's power to prescribe a system of charges that is designed to satisfy Communications Act requirements. The MFJ does not purport to do so.

might be desirable to adapt our plan to include charges for such facilities and services.[70] 90 FCC 2d at 153. We sought suggestions to adapt that plan to include these additional services and facilities.

207. We have concluded that, for reasons we have already discussed, the better choice is to adapt our tentative plan to account for the additional access elements contemplated by the MFJ. In particular, we have added to the plan an element we call the "Dedicated Transport element" through which local telephone companies will recover the interstate revenue requirement associated with the costs of the facilities linking the switches of interexchange carriers to the distribution facilities of local carriers. While we recognize that this element reflects costs that are fundamentally non-traffic sensitive in nature, we have chosen to include the Dedicated Transport element in our discussion of traffic sensitive costs because we perceive it to be an intrinsic part of the costs associated with providing interexchange carriers with access to the local network. Moreover, while the costs associated with the Dedicated Transport element are not traffic sensitive and will not be recovered through usage sensitive rates, these facilities will continue to have such an impact upon the local carrier's configuration of the traffic sensitive components of its network that we believe it is logical to discuss recovery of the cost associated with this component of local network facilities in this Part of this *Report and Order*.

208. The *Separations Manual* classifies certain central office equipment as non-traffic sensitive and allocates the related investment between the jurisdictions as if it were subscriber plant equipment. As previously noted, we have decided that we should not include this non-traffic sensitive central office equipment in our NTS plan because the separations classifications may change in the future. We are, nevertheless, including separate elements for traffic sensitive and non-traffic sensitive portions of Category 6 central office equipment in this part of our plan for the initial access charges because it appears unlikely that any changes in the separations classifications for Category 6 central office equipment could be implemented in 1984.

209. In the *Fourth Supplemental Notice*, we stated that we still found it "reasonable to expect interexchange carriers to compensate exchange carriers for traffic sensitive costs on a traffic sensitive basis." 90 FCC 2d at 152. The tentative plan in the *Second Supplemental Notice* called for interexchange carriers to compensate exchange carriers for traffic sensitive costs on a traffic sensitive basis. In their responses to the *Fourth Supplemental Notice*, some participants stated that end users should be charged directly for all

[70] Examples of such facilities and services include the lines or trunks between a telephone company end office and an interexchange switch and billing and collection services.

costs associated with access services, including traffic sensitive costs.[71] This, they asserted, would reduce administrative expenses and eliminate the inaccuracies of separations and settlements. We believe it would accomplish neither. With the adoption of our access rules, the settlements process for access service compensation will end. While billing end users for all access costs might indeed reduce administrative expenses for the interexchange carriers, such an approach would impose a tremendous burden on the exchange carriers and end users. If the customer originating the call had to pay directly for the costs of the facilities used to terminate his interstate call, this would require the terminating exchange carrier, apparently through recourse to the interexchange carrier involved, to identify the end user originating the call and then to bill that user directly for the costs associated with the type of interconnection provided to the interexchange carrier. This would not only impose substantially greater administrative burdens upon these exchange carriers, but also would constitute a drastic change in the relationships among end users, local telephone companies and interexchange carriers, a change that we cannot perceive to be in the public interest. If instead all end users are expected to bear the costs of all plant in their exchange area used to provide access service to interstate carriers, whether the resulting charge is flat, usage sensitive or a combination of both, almost certainly that approach will result in costs being recovered from customers who have not caused the exchange carrier to incur those costs. In particular, end users will be subsidizing the use of their local facilities by those terminating calls in their exchange area. Such an unfair result cannot be in the public interest. Moreover, this approach would not eliminate any alleged inaccuracies in the separations process.

210. In general, those participants addressing the appropriate structure for charges to recover traffic sensitive costs agreed that the rates should be usage sensitive.[72] In its comments to the *Fourth Supplemental Notice*, Southern Pacific adds that these charges should be sufficiently unbundled to assure that each interexchange carrier pays only for the local access facilities it receives. We believe that the rules we have adopted to recover the costs of access facilities are sufficiently refined to achieve this result. Southern Pacific also asserts that these charges should be adjusted to reflect the diminished value of interexchange service resulting from unequal interconnection. We have already explained why we have chosen to rely

[71] *See, e.g.*, Comments of United States Transmission Services, pp. 12, 20; Comments of the Association of Long Distance Telephone Companies, p. 8 at n. 10, pp. 25–26; Joint Comments of Tel. Systems Management Corporation, Satelco, Inc. and Teltec Saving Communications Co., p. 2; Comments of Curtis M. Bushnell, Public Utility Consultant, pp. 15, 19.

[72] *See, e.g.*, Comments of Centel, SBS and USITA.

upon a premium access charge to account for differences in the quality of interconnection offered to different interexchange carriers. *See* Part III.C, *supra*. Consequently, our rules for computing charges to recover traffic sensitive costs rely only upon cost causation to compute charges.

211. In developing our access charge rules we have considered exchange access for interexchange carriers providing switched services to be composed of two categories or groups of elements. The first category consists of the transmission (and related switching) facilities which carry interexchange traffic between the interexchange carrier's facilities and the Class 5 (end) office at which this traffic originates or terminates. This plant always includes some dedicated trunks which carry only that interexchange carrier's traffic to a switch within the exchange. It also includes the interface between the dedicated transport line and the exchange carrier's switch. For the OCCs, it would correspond to Rate Element 1 in the ENFIA A tariff (BSOC-8) and in the ENFIA B and C tariff (BSOC-9). This is the element we have called "Dedicated Transport." If the local switch is not the end office switch used to terminate or originate an interexchange call, additional trunks and possibly local tandem switches will be required to complete transmission between that end office switch and the interexchange carrier facilities. Most of this equipment is traffic sensitive (TS) and because it may be shared by several carriers, we call the associated access element "Common Transport."

212. The second category, called the "end office" category, corresponds to the central office equipment in the end office at which the interexchange carrier's traffic originates or terminates. This element includes all the traffic sensitive central office equipment (COE) used to provide switching and related services, including operator assistance services. In this Part, we describe the guidelines we have developed to recover the costs allocated to the different plant elements within the categories. We also discuss the rules that will govern recovery of costs for such special services as Billing and Collection.

A. *End Office Charges*

213. To complete transmission of interstate or foreign switched communications to and from the premises of an end user, an interexchange carrier must rely upon facilities located at the end office to which that end user's telephone is directly linked. In particular it must use local dial switching equipment and may use operator services to assure successful transmissions. We refer to the charges associated with the use of this equipment generically as "end office charges." In this section we unbundle these charges into five elements: (1) Line Termination; (2) Local Switching; (3) Intercept services; (4) Information services; and (5) Operator Assistance

services. The first two elements reflect an interexchange carrier's use of local switching equipment, which the *Separations Manual* classifies as Category 6 central office equipment; the remaining three elements reflect an interexchange carrier's use of equipment that the *Separations Manual* classifies as Category 1 central office equipment. For this reason we are adopting these *Separations Manual* categories as the basis for defining the direct costs allocated to each of these elements.[73]

1. *Category 6 Central Office Equipment*

214. *Line Termination Element.* The *Separations Manual* divides Category 6 Central Office Equipment (COE) into non-traffic sensitive (NTS) and traffic sensitive (TS) subcategories to distinguish the fixed costs of terminating lines in the switch from the usage sensitive costs of switching.[74] The Line Termination element consists of the portion of the investment in the local switch that separations considers non-traffic sensitive and the associated indirect investment and expenses. Such costs should be recovered from all interstate carriers providing switched services and allocated among these carriers based on their relative conversation minutes.[75]

215. Separations has relied upon factors developed by Bell-USITA studies to determine the portion of investment in different types of switches that is and is not traffic sensitive. In CC Docket No.

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[73] The procedures for computing charges for those elements are described in Section 69.106-69.110 of the rules.

[74] That portion of non-traffic sensitive category 6 central office equipment used to provide trunk conditioning and signalling between the carriers' switching facilities is included in the Dedicated Transport element.

[75] The allocation of NTS Central Office Equipment on a usage basis represents an apparent inconsistency with the approach we have taken to recover almost all other non-traffic sensitive plant. We believe, however, that this apparent inconsistency is resolved by a closer examination of the facilities involved.

Non-traffic sensitive facilities the costs of which are to be recovered through end user charges are all dedicated to particular subscribers or, in the case of party lines, groups of subscribers. (The only exception is pay phone service, the costs of which are apportioned on a usage basis).

As compared to older electro-mechanical facilities, a far larger fraction of modern central office facilities has been classified as non-traffic sensitive. Such modern facilities can offer subscribers many more or improved service options than could the facilities that they replace. Not all subscribers require or even desire such additional services. It does not seem appropriate, therefore, to treat these facilities as if they were dedicated.

The Joint Board will have the opportunity more closely to investigate whether the *Separations Manual's* treatment of the costs associated with these electronic switches should be revised. It is possible that after its investigation is completed we shall perceive a need to revise the rate structure for this element so that it reflects cost causation more accurately.

80-286, the Joint Board is considering whether these factors should be revised.[76] We believe, however, that to assure that our access charge plan becomes effective on January 1, 1984, we must provide carriers with specific guidelines for developing their access charges as early as possible. Consequently, we must proceed to establish these guidelines without the benefit of the Joint Board's recommendations. We have concluded that in developing the access charges to become effective in 1984 it is reasonable to rely upon existing Bell-USITA factors to distinguish NTS from TS Category 6 COE. If Joint Board recommendations result in the revision of these factors, we would expect these changes to be reflected in access charges for later years.

216. Our tentative plan in the *Second Supplemental Notice* had assigned Line Termination costs to private lines even though they do not terminate in a Class 5 (end office) switch. We intended that apportionment to serve as a surrogate for certain costs, including those attributable to "leaky PBXs", that cannot be easily identified.[77] In the plan we adopt today, we have already allocated to private lines the costs of other NTS plant that could serve to ensure recovery as a surrogate for these less easily identifiable costs. We also believe that the leaky PBX phenomenon may become much less significant in the future as cost-based access charges produce a shift to MTS by those private line customers capable of "leaking." For these reasons we are not assigning any Line Termination costs to private line services.

217. *Local Switching Element.* Through charges associated with this element, local carriers will recover the costs associated with interexchange carriers' use of traffic sensitive (TS) Category 6 central office equipment (COE) to complete interstate switched services.[78]

218. In the *Second Supplemental Notice* we had concluded that no traffic sensitive costs should be assigned to services not using the local exchange's switching facilities. Consequently, we proposed that these costs be allocated on a usage basis among three switched service categories: MTS/WATS; FX/CCSA open end access; and

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[76] *See Joint Board Order, supra,* 47 Fed. Reg. at 54498.

[77] These costs include the costs of "hard wiring" these lines into place or otherwise providing special arrangements or treatment for private lines. They also include costs attributable to the "leaky PBX" phenomenon that we described in the *Second Supplemental Notice* . *See* 77 FCC 2d at 241. This phenomenon arises whenever an interstate call is "patched" through a PBX from a private line to a common subscriber line. That common line, the local exchange switch, another subscriber's common line and another subscriber's station equipment are all used to complete the call, but such private line usage of those facilities is not presently reflected in the computation of private line access service compensation.

[78] Some services classified as private line are, in fact, switched (*e.g.* , CCSA). If costs of some traffic sensitive switching equipment are now directly assigned to such services, we intend such direct assignment to continue.

OCC-ENFIA. Weighted dial equipment minutes (DEMs) were used as the unit of measurement.

219. The *Separations Manual* uses DEMs as the unit of measurement for purposes of allocating the traffic sensitive portion of Category 6 COE between the interstate and intrastate jurisdictions. However, Section 24.83 of the *Manual* applies a weighting factor known as TWF (Toll Weighting Factor) to the "toll" DEMs to reflect the difference in average cost per toll minute of use as compared to the average cost per exchange minute of use. The present *Manual* does not specify the TWF factors.[79] Different factors were developed for different types of switches in the Bell-USITA studies that developed NTS-TS ratios for the same categories of switches. The TWF factor differs from the subscriber plant factor (SPF) in that TWF is related to cost causational principles. Long distance calls require switching capabilities that local exchange calls do not. the TWF factor was designed to segregate costs that are peculiar to long distance calls.[80]

220. In comments filed in response to the *Second Supplemental Notice* , Southern Pacific suggested that costs that are assigned to the interstate jurisdiction as a result of the application of the TWF factor should be excluded from the computation of ENFIA A access charges because ENFIA A services use the local exchange in the same manner as local exchange service.[81] (Comments, pp. 47-50). In Reply Comments to the same *Notice* , AT&T agreed that some adjustment would be reasonable. It noted that at the open-end FX also uses local exchange switching in the same manner as local exchange service. (Reply, p. 63).

221. In the recent *Joint Board Order* ,[82] the Joint Board proposed that both interstate FX/CCSA open-end access services and interstate ENFIA services be explicitly recognized in the *Separations Manual* as interstate services. It also recommended that for apportioning costs of traffic sensitive switching equipment, all FX/CCSA,

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[79] The Joint Board has tentatively recommended that this continue. *See Joint Board Order* , *supra* , 47 Fed. Reg. at 54505.

[80] Although the TWF factor was designed to reflect cost causational principles, it is not based on a historical cost causational principle. The *Manual* was designed to allocate costs between two "old" services that will continue to exist. Allocations are based upon actual relative use during a prior period rather than projected use during some future period.

[81] At the time these comments were filed, the ENFIA B and ENFIA C service offerings did not exist. ENFIA B and ENFIA C provide access through trunk side connections to end offices and through trunk side connections to tandem offices respectively. ENFIA B provides more signaling information to the interexchange carrier than does ENFIA A, as well as automatic number identification and answer supervision. ENFIA B also permits subscriber use of rotary dial telephones to reach OCC switches. While ENFIA C does not provide these additional services, it permits an OCC switch to serve subscribers in more than one exchange directly.

[82] *See Joint Board Order* , *supra* , 47 Fed. Reg. at 54495, 54498.

ENFIA A and ENFIA C dial equipment minutes be treated like exchange service DEMs with no toll weighting factor applied to them. Recognizing that ENFIA B appeared to use the local switch more like MTS than like exchange service, the Joint Board is seeking to determine whether the similarity between ENFIA B and MTS warrants treating DEMs generated by ENFIA B use of local switches like DEMs generated by MTS use.

222. If the average costs associated with different interstate switched services' use of local dial switching equipment vary, these differences should be reflected in the rate structure of this element in order to assure that there will be no unlawful discrimination in rates for functionally equivalent services. As a first approximation to achieving this goal we are requiring that exchange carriers establish separate charges for two categories of service. The first category corresponds to local dial switching provided through line side termination at a Class 5 (or end) office or, for interstate services other than MTS and WATS, through termination in a local tandem switch. The second corresponds to local dial switching provided through trunk side termination at a Class 5 office for MTS/WATS equivalent services and switching provided for MTS and WATS. Based on available information we believe these service categories result in a grouping together of those interstate service offerings for which the average cost per minute of using the local switch is approximately the same. In particular, use of switching equipment by FX/CCSA open-end access, ENFIA A and ENFIA C services should fall within the first category of service while end office switching for MTS, WATS and ENFIA B should fall within the second category.

223. For computing 1984 access charges, the costs associated with local dial switching equipment shall be allocated between the two service categories based on relative DEMs, after the toll weighting factors developed in the separations process have been applied to DEMs generated by services in the second service category.[83] To convert these allocations to monthly per minute

[83] We recognize that the Joint Board deliberations may result in development of new TWFs to be applied exclusively to ENFIA B services. We anticipate that the scheme for allocating investment in TS local dial switching equipment we prescribe here would be altered so that these new TWFs would be applied to ENFIA B DEMs. We believe, however, that it is unrealistic to expect that development of such new TWFs could be completed before the end of the third quarter of 1983. The carriers require a reasonable time to develop and file their 1984 access charges and we shall require time to review these filings. For this reason, we conclude that 1984 access charges should not reflect the development of any new TWFs for ENFIA B services.

charges, the revenue requirement for each service category shall be divided by that category's projected average conversation minutes.[84] For a given month, the local switching equipment charge levied upon a carrier providing a service (or services) included in that service category will be the product of that category's unit charge and the conversation minutes generated by the carrier's service(s).

224. In responses to our *Second Supplemental Notice* , some participants had suggested that the tentative plan be modified in order to incorporate peak and off-peak pricing in the prescribed access charges. (Consumers Union Reply, pp. 9-10; NTIA Reply, pp. 32–33) Such a modification would presumably be limited to the traffic sensitive components like the Local Switching element inasmuch as non-traffic sensitive costs do not vary with usage. That suggestion warrants consideration as a long-run solution. However, we could not devise adequate rules for computing cost-based peak or off-peak access charges for this traffic sensitive plant from the information in this record. Therefore the rate structure, at least for 1984 access charges, will reflect no discount for off-peak usage of traffic sensitive exchange facilities.[85]

225. It should be noted that the efficiency benefits of peak pricing flow from the use of peak pricing in end user rates. The use of peak pricing in a carrier's carrier charge need not have any direct effect upon usage. Consistency between carrier's carrier charges and end user rates would be desirable, but time of day pricing of access service compensation is not a condition precedent for time of day pricing of end user services. MTS tariffs have established different rates for different times for a number of years even though the settlements formula for computing MTS access service compensation has never assigned different weights to different MTS minutes.

2. *Manual Switchboard Services*

226. Category 1 central office equipment consists of investment in manual switchboards. Manual switchboards are used primarily in connection with MTS and WATS service. In reply comments to the *Second Supplemental Notice* , however, AT&T asserted that the OCC-ENFIA and FX-CCSA services should share in costs relating to manual switchboards providing information and intercept services because both FX-CCSA open end access and OCC-ENFIA services

[84] These averages shall be developed through traffic studies, with necessary information being supplied by the interexchange carriers if the exchange carrier is unable to obtain such information directly.

[85] We intend shortly to establish a Joint Board that will consider the need for changes to the *Separations Manual* that will allocate investment and expenses between the jurisdictions based on peak and off-peak use of exchange facilities. When that Board has completed its work on this subject, we shall reconsider our decision concerning a peak/off-peak rate structure for traffic sensitive access charge elements.

also rely upon those operator services. AT&T indicated that directory and intercept switchboards can be identified without undue difficulty. Therefore, we propose to associate Category 1 investment allocated to the interstate access with one of three access elements: (a) the Intercept element; (b) the Information element; and (c) the Operator Assistance element.

227. *Intercept Element* . A local carrier provides Intercept services when it causes a telephone call directed to an improper telephone number to be redirected to an operator or a recording that tells the caller why the call, as dialed, could not be completed and if possible, provides the correct number. By its nature, this service must be provided either to all interexchange carriers or to none. We believe that because all rely upon this service to assure successful completion of their customers' interexchange calls, all should share in the costs associated with its provision. There do not appear to be any cost or value differences with respect to the use of Intercept services that would warrant the application of any weighting factors to distinguish one interexchange carrier's use from another's. Therefore, we have decided to subject all interexchange carriers to a per minute Intercept charge that is computed by dividing costs allocable to this element by total conversation minutes for all switched or partially switched interstate services.

228. *Information Element* . As its name suggests, Information service is provided when, by dialing the proper service code or number, a customer is connected to an operator who will tell him the telephone number of another customer, provided that the latter's number is or will be listed in the telephone directory. Based upon AT&T's *Second Supplemental Notice* Reply Comments we conclude that the costs associated with this service can be unbundled from those associated with the use of other Category 1 COE. We believe that these costs should be unbundled from other manual switchboard costs. At the present time directory information that is provided for long distance services is provided through transmission facilities of AT&T and its interexchange partners. These costs will accordingly be assessed upon those carriers unless other interexchange carriers establish connections with such directory assistance facilities.[86]

229. *Operator Assistance Element* . This element describes the remaining interstate operator services, primarily direct assistance in the completion of toll calls. To this element we allocate that investment in Category 1 COE not already allocated to either the Intercept or Information elements, as well as the indirect investment and expenses associated with this Category 1 investment under our

[86] If that contingency arises, exchange carriers that provide the information service will be required to devise an appropriate method to apportion such costs among all interexchange carriers that are connected with such directory assistance switchboards.

allocation rules. The costs associated with this element should be recovered through a non-discriminatory, usage-sensitive rate structure imposed only upon those interexchange carriers who in fact use these interstate Operator Assistance services.

B. *Transport Charges*

230. As part of its access service, each local exchange carrier will provide transmission (and possibly) switching facilities to carry interstate switched traffic between an interexchange carrier's facilities and the end office through which this traffic originates or terminates. This plant always includes some dedicated trunks or lines, which carry only that interexchange carrier's traffic to a switch within the area served by the local carrier.[87] We refer to the element corresponding to this plant as the "Dedicated Transport" element. If this exchange carrier switch is not the end office switch used to originate or terminate the interstate call, additional trunks, local office and local tandem switches will be required to complete the communications path between the originating (or terminating) end office and the interexchange carrier's facilities. We refer to the element corresponding to this plant as the "Common Transport" element.[88] The costs associated with both Dedicated Transport and Common Transport will be recovered as part of the carrier's carrier charge for access to the local company's facilities needed to complete interstate communications.[89]

1. *Dedicated Transport Element*

231. This element consists of the dedicated voice grade transmission facilities and the interface at which those facilities and the exchange carrier's switch are joined.[90] For non-premium carriers, *i.e*

[87] In some cases, two exchange companies jointly might provide such a trunking service.

[88] The procedures for computing charges for the Transport elements are described in Sections 69.111 and 69.112 of the Rules.

[89] We are not, however, including any use of switching in a local dial (Category 6) switch in the Common Transport element.

[90] The facilities included in this element and other elements are the subject of the Settlement Agreement between the Bell System companies and the OCCs that we accepted as a disposition of Docket 20099. *See* 52 FCC 2d 727 (1975). That agreement established interim rates for the OCCs' use of certain Bell System facilities. It also established procedures for revising such rates that are still in effect. In particular, it permitted a carrier-initiated increase in the rates only on six months' notice to the OCCs. *Id* . at 734–35. We predicated our acceptance of that agreement on our finding that "the responsibilities undertaken by the parties are in the public interest because they expedite and further the implementation of established Commission policy." *Id* . at 732. If applied to the access tariffs which will replace the existing tariffs under which the BOCs provide dedicated transport facilities to the OCCs, such a notice requirement could prevent the timely implementation of these access tariffs. We have not determined whether the agreement purports to establish a notice requirement under these circumstances. Because we find such delay contrary to the public

the OCCs, this element would correspond to what is now designated as rate element 1 in the ENFIA A tariff. To this element we allocate investment in the outside plant linking the carriers' switching facilities as well as any Category 8 and non-traffic sensitive Category 6 central office equipment used to provide trunk conditioning and signaling between the carriers switching facilities.

232. USITA has suggested that the costs associated with this element be recovered through rate structures reflecting "capacity ordered." A rate structure based on "capacity ordered" may bear little relationship to what is, in fact, provided. We believe that an interexchange carrier should pay only for facilities it in fact receives. We can appreciate that in order to plan its network to assure the highest quality of service to all its customers a local carrier requires advance information of an interexchange carrier's anticipated needs and demands upon the local system. We do not believe that this information bears any intrinsic relationship to the costs incurred in currently providing services to these carriers.[91]

233. We are requiring that the revenue requirement associated with the Dedicated Transport element be split into three parts on the basis of relative net investment in: (1) interface arrangements; (2) voice grade transmission facilities; and (3) equipment used to provide conditioning for such transmission facilities. As a result, the charge associated with the Dedicated Transport element will be the sum of a charge reflecting the costs of voice grade transmission facilities dedicated to an interexchange carrier's use, a charge reflecting the costs of conditioning those facilities and a charge reflecting the costs of any additional central office equipment located at the boundary between those facilities and the local carrier's switch to which they are joined. In requiring this unbundling of charges our aim is to assure that the charges imposed upon an interexchange carrier for its use of dedicated transport facilities reflect the costs associated with the facilities provided to that carrier.[92]

234. *Interface Arrangements* . To this subelement we have allocated all investment in central office equipment used to provide

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interest, we are abrogating any contractual notice requirement of the Settlement Agreement that might be applicable. Any other provision of that agreement or the subsequent ENFIA agreement that may be inconsistent with the Rules we are adopting will, of course, cease to be effective when access charges become effective. The decision in *MCI Telecommunications Corp. v. FCC* , 665 F.2d 1300 (D.C. Cir. 1981) does not preclude us from abrogating provisions that are inconsistent with our prescription of an access charge plan. That decision related to carrier-initiated tariff charges.

[91] *See* Reply Comments of United States Independent Telephone Association.

[92] We believe that this is very similar to the refinements within this rate element advocated by the Ad Hoc Committee and Southern Pacific in their comments submitted in response to the *Fourth Supplemental Notice* . *See* Report on Access Charges attached to Comments on the Fourth Supplemental Notice filed by the Committee and Comments of Southern Pacific Communications Company, Appendix B.

interface arrangements. We have taken this step because we recognize that exchange carriers will be offering to interexchange carriers access arrangements that rely upon central office equipment to provide different signaling and other capabilities. We shall require that each exchange carrier establish in its access tariff a separate charge for each additional kind of interface arrangement it proposes to offer.[93]

235. We shall require that each exchange carrier present a listing of subelements corresponding to all the interface arrangements it intends to offer. It is through these subelements that the carrier will recover the share of its projected revenue requirement for Dedicated Transport that our allocation rules have apportioned to interface arrangements. To provide carriers with sufficient flexibility to develop access charges reflecting the many kinds of interface arrangements they may choose to offer, we have refrained from prescribing rules specifying precisely how the charges associated with these subelements must be calculated. We do require, however, that differences in the charges for these interface arrangements reflect cost differences.

236. *Conditioning arrangements.* The quality of voice communications over transmission facilities may be impaired by such factors as trunk loss, noise or echo. Alone or in combination, these factors may partially or sometimes completely obscure the information content of voice transmissions. Transmission facilities, however, may be conditioned to control these parameters[94] in order to improve the quality of such transmissions.

237. We shall require that each exchange carrier present a system of subelements corresponding to all the conditioning arrangements it intends to offer. Subelement charges will also be designed to recover the aggregate conditioning revenue requirement and charges for particular subelements will be designed to reflect cost differences among conditioning arrangements.[95]

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[93] Such arrangement might include, for example, an E & M lead interface, which is:

> A specific form of interface between a switching system and a trunk in which the signaling information is transferred across the interface via 2-state voltage conditions on two leads, each with ground return, separate from the leads used for message information. The message and signaling information are combined (and separated) by a signaling system appropriate for application to the transmission facility.

Engineering and Operations in the Bell System (1977) at 652. For a general discussion of common interface arrangements, *see id*. 181–86, 384–403.

[94] *See, e.g.*, the family of "W types" of conditioning offered in the Bell System's Facilities for Other Common Carrier Tariffs.

[95] Association tariffs may contain exceptions for participating carriers that offer interface and conditioning arrangements that differ from any standard subelements in the association tariff. Similar exceptions will be permitted for Special Access subelements.

238. *Transmission facilities.* To this subelement we allocate investment in all dedicated voice grade transmission facilities to be provided to interexchange carriers to complete their interstate or international communications services. These dedicated facilities are analogous to the non-traffic sensitive subscriber line plant dedicated to an end user's use. Consequently, we shall require local telephone companies to recover the costs associated under our allocation rules with this subelement through a flat monthly charge imposed upon each interexchange carrier receiving access through such facilities. The costs associated with Dedicated Transport facilities are a function of two parameters. The first is the distance between the interexchange carrier's facilities and the "entry switch" through which that carrier's traffic enters the exchange area. The second is the number of voice grade channels provided to the interexchange carrier. The latter we shall call "conversation capacity." We shall require that the monthly charge levied upon an interexchange carrier for voice grade facilities dedicated to its use shall be based upon the conversation capacity provided by these facilities and a distance factor.

239. At this time all AT&T toll offices are linked to local offices through 4-wire or 4-wire equivalent voice grade facilities. At least some AT&T offices are collocated with end office switches. Other interexchange carriers, however, have never been allowed to collocate their switches with local telephone company switches. A strictly distance-sensitive rate structure for dedicated transmission facilities would thus give AT&T an unfair competitive advantage. Consequently, we shall require that for purposes of computing a monthly charge associated with this subelement, for an interexchange carrier other than AT&T the distance between the interexchange carrier's facility and the "entry switch" to which it is linked shall be deemed to be the minimum of the following: the airline distance between the entry switch and this interexchange carrier facility; and the airline distance between the entry switch and any AT&T toll switch within 5 miles of the interexchange carrier's facility.[96]

[96] This "five-mile" requirement is similar to one imposed in the MFJ upon any BOC-initiated tariff to reduce the competitive advantage AT&T enjoys over other interexchange carriers because of the location of some of its switches. The MFJ has required that under such tariffs until September 1, 1991, the charge for delivery or receipt of traffic of the same type between an end office and each interexchange carrier's facilities located within the exchange area (or any reasonable subzones) be equal per unit of traffic delivered or received for all such carriers. If the facilities of another interexchange carrier are located within 5 miles of an AT&T Class 4 switch, with respect to any end office served by that switch, the OCC facility is to be considered within the same subzone as the AT&T switch. This requirement applies even if a BOC uses different transmission and switching facilities to serve AT&T and the other interexchange carriers; it exists to assure that the OCCs are not charged more for transmission merely because AT&T's switches are more advantageously located with respect to or linked to an end office.

240. We recognize that the costs of providing Dedicated Transport to a particular interexchange carrier also depend upon the transmission media selected to carry its traffic between its facilities and the "entry switch." A purely cost-based rate structure would tie the charges imposed on an interexchange carrier to this factor also. With all the permutations and combinations of transmission media possible, however, such a rate structure could easily become unworkably complicated. The rate structure we have adopted today, while not purely cost-based, avoids the administrative problems associated with such a rate structure and provides local exchange carriers with the incentive to use the most efficient means of transmitting traffic and the flexibility they need in planning their network. We believe that these advantages warrant this limited departure from cost-based pricing, at least during the first year in which access charges are in effect.

2. *Common Transport Element*

241. To this element we allocate the investment in all outside plant used in whole or in part to transmit an interexchange carrier's switched traffic between the end office at which it originates or terminates and the transport facilities dedicated to that carrier's use. We also allocate some investment in intermediate switching facilities such as local tandem offices.[97]

242. The costs associated with this access element are both usage and distance sensitive. Consequently, we are prescribing a rate structure that is both usage and distance sensitive. The measure of usage shall be conversation minutes of use, while the measure of distance shall be the airline distance from "entry switch" to the end office at which a call originates or terminates.

C. *Other Charges*

1. *Billing and Collection Services*

243. To this element we are allocating all the costs associated with a local carrier's providing billing and collection services to an interexchange carrier. In particular this would include investment in Category 4 central office equipment, automatic message recording equipment, and most of the revenue accounting expenses allocated to the interstate jurisdiction.[98]

244. The MFJ would permit a BOC to restrict its offer of billing

[97] We note that the plan we adopt today for developing a carrier's carrier charge will accommodate access arrangements provided by the independent telephone companies and by the divested BOC, regardless of the shape of the local access and transport areas (LATAs) ultimately approved by the court in United States v. Western Electric Company, D.D.C. Civil Action No. 82–0192.

[98] Computation of charges for this element is described in Section 69.114 of the Rules.

and collection services to only some interexchange carriers unless the BOC threatened to withhold service from a customer failing to pay charges levied by such interexchange carriers.[99] The MFJ does require, however, that if a BOC offers billing and collection services to even one interexchange carrier, that the charge for this service must be in the BOC's access tariff. Only common carrier services can be tariffed. The hallmark of a common carrier service is that it is offered to all indifferently. *See CCIA* v. *FCC, supra*, slip op. at 25. Consequently, to assure a result consistent with our powers under Title II of the Communications Act of 1934, as amended, 47 U.S.C. 201 *et seq.*, and the intent of the MFJ, we shall require that an exchange carrier offering billing or collection or billing information services to one interexchange carrier must offer them to all.

245. In contrast with our treatment of rates related to other access elements, the only restrictions we shall place upon a local carrier offering Billing and Collection services is that it not discriminate among carriers selecting these services. Any differences in charges levied for these services must be cost justified.

2. *Special Access*

246. Special Access includes a variety of services and facilities that we have decided to include in our system of access charges in order to ensure that tariffed access charges of all exchange carriers encompass services and facilities that the divested BOCs will be offering pursuant to tariffed access charges.[100] If the MFJ did not exist, we would probably exclude these facilities from the access charge scheme and classify them as "interexchange" for this purpose. Most services that use these facilities—such as program transmission, telex, etc.—are not close substitutes for MTS and changes in existing rate structures would not be required in order to eliminate discrimination or preferences among MTS and services that are close substitutes for MTS.

247. The Special Access category also includes a portion of interstate or international private lines that terminate in a PBX or similar equipment and interstate WATS lines. We limit the Dedicated Access Line element to the portion of those lines on the customer side of an end office in order to create a Dedicated Access Line element that is analogous to the Common Line element. We use that demarcation in order to establish parity for comparable elements. A portion of such private lines and a portion of some WATS access lines that are not included in the Dedicated Access Line element are included in access service for purposes of the MFJ. We are assigning

[99] In the latter case the MFJ does require the BOC to offer billing and collection services to all.

[100] Computation of charges for this element is described in Section 69.113 of the Rules.

those portions of those lines to Special Access in order to make access changes for all carriers correspond with the BOC access charges.

248. Although we have described Special Access as an element for cost allocation purposes, the Special Access category in fact encompasses a number of elements that must be priced separately. The same charges could not be applied to video "lines", telex lines and pieces of WATS access lines without creating unlawful preferences. Such facilities have very different cost characteristics and are used for very different purposes.

249. We have not attempted to provide guidelines for apportioning the Special Access revenue requirement among the rate elements or subelements within that category and we have not described the subelements that should be used. This proceeding was not designed to develop criteria for designating such subelements or for apportioning costs among appropriate subelements and the record in this docket does not contain much information that would be useful for those purposes. Such questions have been or will be addressed in other Commission proceedings.[101] We are accordingly directing exchange carriers to establish subelements and methods for computing subelement charges that are consistent with applicable Commission rules and decisions.

V. *COMPUTATION OF ACCESS CHARGES*

250. In order to compute a charge for an access element it will generally be necessary to compute a revenue requirement for that element. Under the rate base - rate of return method of ratemaking costs or revenue requirements consist of two components. The return component is computed by multiplying the rate base or investment by an allowed rate of return. The expense component covers the carrier's allowable operating expenses.

251. We have decided that the usual rate base - rate of return method should be used to compute access charges for each element except Billing and Collection. We are not imposing any constraint upon the return carriers may earn for that service because local exchange carriers do not possess sufficient market power with respect to that service to warrant a rate of return prescription. If the local exchange carriers establish excessive Billing and Collection charges, the interexchange carriers can, and undoubtedly will, do their own billing and collection.

A. *Rate of Return*

252. We will require the exchange carriers to compute charges for all the other access elements that are targeted to earn the same return. We are not, however, specifying a prescribed return in the

[101] *See AT&T Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979).

text of the access charge rules. Such prescriptions necessarily must be revised from time to time in *ad hoc* proceedings that are designed for that purpose. It would not be appropriate to effect changes in a prescribed rate of return through amendments to the rules. We are, however, requiring exchange carriers to use the currently authorized rate of return to compute access charges until that prescription is superseded by further order of this Commission.

253. We have already prescribed a rate of return of 12.75% for AT&T interstate operations. This targeted rate was established after consideration of all AT&T interstate capital costs, including capital costs associated with the provision of access service. Although that prescription has not been imposed directly upon other telephone companies, the existing partnership interstate settlements arrangement has been designed to enable every telephone company to realize the same achieved rate of return that AT&T realizes on interstate operations. Thus, the use of any rate of return other than 12.75% for the purpose of targeting access charges for BOCs or independent telephone companies would be a departure from the *status quo.*

254. Although the *Second Supplemental Notice* did propose to use the AT&T authorized rate of return for purposes of targeting access charges, the *Fourth Supplemental Notice* invited comment on the desirability of prescribing a different return inasmuch as BOC costs of capital may diverge from AT&T costs of capital after divestiture.[102] Most participants who have discussed this subject have suggested that the 12.75% return be used for the initial access charges. No evidence has been developed in this record that would enable us to predict any future divergence in AT&T and BOC costs of capital. Therefore, we will require that a 12.75% return be used to target access charges of any exchange carrier and interexchange services of AT&T until a different authorized rate of return is established in subsequent proceedings. We may or may not conduct separate proceedings to consider any future revisions in the prescribed rate of return for access and interexchange services.

B. *Identification of Access Costs*

255. Several steps are necessary to identify the investment and expense that is attributable to a particular access element. Invest-

[102] The *Fourth Supplemental Notice* also suggested that returns allowed by state commissions might be used if access charges are disaggregated on a state-by-state basis. The Executive Agencies of the United States recommended that procedure (Comments, p. 18), but Southern New England Telephone Company said (Comments, p. 12) that it would probably be "inappropriate" to use a state rate of return for any interstate service. Inasmuch as we have decided that such disaggregation would not be appropriate, there is no reason to give further consideration to that approach. Any nationwide charges necessarily must be based upon a nationwide rate of return.

ment and expenses relating to telephone operations must be segregated from other investment and expense. Interstate telephone operations investment and expense must be segregated from intrastate investment and expense. The access charge or exchange plant portion of interstate investment and expense must be segregated from other interstate investment and expense. The access portion must be allocated among the access elements.

256. Carriers are already obliged to perform the first two steps in order to compute revenue requirements for interstate services. This Commission has provided guidance for the identification of regulated service costs through accounting rules and decisions in tariff proceedings. We have also prescribed rules for the separation of investment and expense between the interstate and intrastate jurisdictions. Those rules are contained in the *Separations Manual* that has been incorporated as Part 67 of our Rules, 47 C.F.R. Part 67. The telephone companies have developed detailed and elaborate procedures to implement the separations rules.

257. The tentative plan described in the *Second Supplemental Notice* would have used the division of revenue or "DR" procedure that AT&T developed to implement the *Separations Manual* in order to determine interstate investment and expense for the computation of access charges. Several comments that were filed in response to that *Notice* questioned the wisdom or propriety of using the DR procedures for that purpose. MCI noted that there is no single fixed document describing Bell System DR procedures that could be incorporated by reference in access charge computation rules. MCI observed that the 11-volume DR Manual is revised monthly and does not contain a complete description of the procedures used to separate interstate and intrastate costs. In its *Second Supplemental Notice* comments, MCI said (p. 55):

> The operative steps are actually taken by a computer located in Atlanta referred to as ISIS. AT&T has informally advised MCI that the programming for ISIS was developed sequentially over a period of many years and that there is no complete set of program inputs in existence.

258. Inasmuch as there is no fixed set of DR procedures we could not incorporate the DR procedures in access charge rules even if we could warrant that the DR procedures have produced accurate results in the past. Moreover, we are not in a position to give such a warranty. The SBS *Second Supplemental Notice* comments observed (p. 48) that the 11-volume DR Manual implements a 96-page *Separations Manual*. SBS implied that some errors of interpretation must have been introduced into the separations implementation process in the course of amplifying the prescribed rules. Although our staff does monitor these processes, this Commission has not formally addressed the myriad of interpretation questions that are lurking within the separations implementation process.

259. USTS filed a petition for evidentiary hearing that was based in large part upon its contention that an evidentiary hearing would be required to compile a record that would enable us to prescribe any separations implementation procedures. We agree that an evidentiary hearing may be necessary to prescribe separations implementation procedures. We have, however, concluded that it will not be necessary to prescribe such procedures in order to prescribe rules for the computation of access charges. We are adopting rules for the computation of access charge revenue requirements that are based upon the premise that investment and expense attributable to regulated interstate operations has already been identified. We can proceed on that assumption without sanctioning separations implementation procedures that may be questionable or foreclosing interested persons from raising questions with respect to the accuracy of the underlying data when access service tariffs are filed.

260. We recognize that the information filed pursuant to Rule 61.38 may not at present be sufficient to enable this Commission or affected persons to identify all questions with respect to the accuracy of interstate costs that might be raised in a tariff proceeding. We have, however, decided that we should not delay the adoption of access charge rules to resolve data problems that are not unique to access charges. Any errors in the separations implementation process affect all state and federal tariffs for services offered by telephone companies. Proceedings other than this docket can and will be used to make separations implementation more visible to regulators and all affected persons.[103]

261. The allocation rules we are adopting do establish procedures for segregating access investment and expense from other interstate investment and expense and procedures for apportioning the access investment and expense among access elements. We have generally used the term "interexchange category" to describe investment, etc., that is not apportioned to any access element. For convenience, we have combined apportionments between interexchange and access and apportionments among access elements in a single set of rules. We have included the Billing and Collection element in that apportionment scheme even though our rules do not require the computation of a revenue requirement for that element because it is necessary to apportion costs to that element in order to identify the costs that are attributable to the other elements.

262. The plan we have adopted for the allocation of certain non-traffic sensitive costs between end user and carrier's carrier charges requires a further step in order to compute charges for the End User Common Line and Carrier Common Line elements. The combined charges for those elements will be designed to recover a revenue

[103] The exchange plant Joint Board has invited comments upon a proposal that may serve that purpose. *See Joint Board Order, supra*, 47 Fed. Reg. at 54490.

requirement for the provision of common lines. Subpart F describes the procedure for segregating that revenue requirement among those elements. We have described the combined revenue requirement for those elements as the Common Line element in the investment and expense allocation rules.[104]

C. *Apportionment of Investment*

263. Investment can be described as direct investment or indirect investment. The direct investment includes the facilities and equipment such as terminals, lines and switches that are actually used in the telephone operations. Indirect investment includes land, buildings, vehicles, office furniture, etc.

264. The allocation of direct investment is generally determined by the nature of the access elements we have described in Parts III and IV of this *Report and Order*. The elements encompass functions that usually correspond to particular categories of facilities and equipment.[105] For example, the Intercept element encompasses the switching facilities and operator services that perform the intercept function and the portion of manual switchboard facilities that are used for that purpose are assigned to the Intercept element.

265. The direct investment allocation rules (Sections 69.303–69.306) relate the description of access elements in Parts III and IV to the plant categories that have traditionally been used for separations purposes. The *Separations Manual* describes three major categories of direct investment - station equipment, outside plant or OSP and central office equipment or COE.

266. Station equipment consists primarily of equipment included in Accounts 231 (station apparatus), 232 (station connections) and 234 (large PBXs). All such equipment is normally described as non-traffic sensitive plant. Some station equipment is used exclusively in connection with Special Access or Pay Telephone services and is assigned to those access elements. Some station equipment is used by the telephone companies in their own operations and should be viewed as indirect investment that is not directly associated with any access element. That investment will be apportioned in the same manner as furniture, office equipment, vehicles, etc.

267. Most of the station equipment is used in conjunction with common lines, but this same equipment is often used in connection with WATS access lines or private lines. Whenever a private line terminates in a PBX, the PBX, the terminals and the inside wiring

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[104] Total revenue requirements for some other elements such as Local Switching, Dedicated Transport and Special Access will also have to be segregated to compute subelement charges.

[105] In view of the functional nature of the access charge elements, the rules for apportionment of direct investment in subpart D essentially define each access element except the End User Common Line and Carrier Common Line elements.

between the terminals and the PBX are used to originate or terminate calls that are transmitted over the private line. Therefore, this category must be apportioned between the Common Line element and the Dedicated Access Line element. We have decided to use an equivalent line concept that is similar to the Mixed 1 proposal for that purpose. The total number of common or local exchange subscriber lines will be multiplied by the applicable interstate separations factor to determine the Common Line element line count that will be used for purposes of that apportionment.

268. The Joint Board in Docket 80–286 is considering a new formula in order to replicate the results that would be produced by the present transitional plan for the elimination of CPE from the interstate rate base in an environment in which some local exchange telephone companies may not own any CPE. We have generally described such an interstate apportionment as surrogate CPE in the access charge rules. Inasmuch as any surrogate CPE investment or expense is indirectly attributable to the use of CPE, surrogate CPE will be apportioned in the same manner as CPE investment or expenses if we adopt such a transitional separations factor.

269. The apportionment of Outside Plant or OSP reflects the basic scheme of the access charge plan. The rules use the term "Customer OSP" to describe lines that are included in our NTS plan and comparable portions of Special Access lines. That category does not include any line that connects an interexchange carrier or an enhanced service provider with the local exchange switch. The Customer OSP lines in use will, of course, be assigned to the Common Line, Pay Telephone, Dedicated Access Line or Special Access elements. An equivalent line apportionment will be used to apportion the unused voice grade lines among those elements.

270. The present separations formula includes common lines and WATS access lines in the same category for purposes of determining interstate investment. If we elect to retain that approach in the separations proceeding, an adjustment will be necessary in the apportionment between the Dedicated Access Line and Common Line elements in order to assign an amount to the Dedicated Access Line element that reflects unseparated investment in interstate WATS access lines. The access charge rules describe such a contingent adjustment.

271. OSP that is not classified as Customer OSP must be apportioned between access elements and the interexchange category. The MFJ demarcation points will be used for that purpose in order to produce traffic sensitive access elements for the independent telephone companies and the undivested BOCs that will be comparable to the access elements of the divested BOCs.

272. The remaining OSP will be apportioned between Special Access and the Transport elements. Special Access not only includes the portion of lines or trunks used for special services such as telex

and video that are not located on the customer side of the end office, but also includes comparable portions of lines or trunks that are used for the "Dedicated Access Line" services. We have used this demarcation in order to produce charges for a Dedicated Access Line element that are comparable to the NTS common line charges.

273. The Transport elements encompass the trunks between the end office and the interexchange facility. These may include exchange trunks between Class 5 offices or Class 5 offices and tandem offices. The assignment to Dedicated Transport or Common Transport is, of course, determined by the definition of those elements that is described in Part IV. If the line or trunk is used exclusively for interexchange services of a particular interexchange carrier it is assigned to Dedicated Transport. Other lines or trunks that are classified as Transport facilities are assigned to the Common Transport element.

274. The description of traffic sensitive elements in Part IV of this *Report and Order* necessarily determines the apportionment of Central Office Equipment that is included in COE Categories 1 and 6 in the present *Separations Manual*. COE 1 equipment will be apportioned among the Intercept, Information and Operator Assistance elements. COE 6 equipment will be apportioned between the Line Termination and Local Switching elements.

275. Inasmuch as the Transport elements encompass facilities between the end office switch and the interexchange switch, tandem switch investment (COE Category 2) and any portion of COE Category 3 investment that is classified as exchange investment for purposes of the MFJ will be included in the Common Transport element. We are not, however, assigning any COE 6 investment to Common Transport when an interexchange transmission is routed through more than one local dial switch at the originating or terminating end. The apportionment formula for COE 6 investment has been designed to take such usage into account.

276. The *Separations Manual* classifies Automatic Message Recording Equipment as COE Category 4. Inasmuch as information recorded by such equipment is used primarily for billing purposes that investment will be assigned to the Billing and Collection element.

277. Although COE Category 5 is described as Other Toll Dial Switching Equipment, it includes equipment "used primarily for operator dialed toll . . . traffic." Any Category 5 equipment that may be classified as exchange for MFJ purposes will accordingly be assigned to the Operator Assistance element. Category 5 equipment that is not exchange equipment for MFJ purposes will, of course, be assigned to the interexchange category.

278. COE Category 7 includes the type of switching equipment that is used for services we have described as Special Access. Such

investment will accordingly be assigned to Special Access unless it would be classified as interexchange for MFJ purposes.

279. The circuit equipment that is included in the COE 8 category will be assigned or allocated in the same manner as the associated OSP.

280. The *Second Supplemental Notice* proposed to use factors in the 1978 AT&T FDC 7 Central Submission for purposes of apportioning indirect investment and expenses. 77 FCC 2d at 243. Upon further reflection we have concluded that we should not use those factors for this purpose. Those factors were developed for an analogous but somewhat different allocation purpose and would accordingly have to be modified to fit our access charge plan.[106] Even if each factor could be adapted, it would not be desirable to use a cost allocation methodology that employs such a large number of different factors. Both BOC and independent telephone company data must be used to compute access charges. Some limitation must be placed upon the number of different categories that are used in order to enable independents to develop or provide data for the computation of access charges and the computation of distributions from any access charge revenue pools. We have accordingly used indirect investment and expense categories that are more aggregated than either the 1978 Central Submission categories or the categories described in the appendix to the AT&T *Second Supplemental Notice* comments.

281. Land and building investment represents the bulk of the indirect investment. We have accordingly concluded that we can strike an appropriate balance between excessive disaggregation and excessive aggregation by apportioning subcategories of Land and Building investment in a particularized manner and apportioning all other indirect investment on the basis of the apportionment of combined direct investment and land and building investment.

282. We have decided to use the space categories in the *Separations Manual* for purposes of apportioning building investment. This should not impose an undue burden on the carriers because such investment has already been assigned to those categories in order to identify the interstate investment. Many of the space categories are closely related to equipment categories that we are using for purposes of apportioning the direct investment.

283. The *Separations Manual* divides Space Category 1 (Operating Room and Central Office Equipment Space) into three subcategories - Manual Switchboard, Circuit equipment, and Dial switching - that do correspond with identifiable equipment categories. Each of those categories will be apportioned in the same proportions as the

[106] Categories and factors that were subsequently adopted in the *ICAM* would also have to be adapted because they were designed for four service categories that are quite different from the functional access categories described in this *Report and Order.*

associated COE. Space Categories 2 and 3 also consist primarily of operator space and will be apportioned in the same proportions as manual switchboard investment.

284. Space Categories 4, 6 and 9 (Commercial Office, Revenue Accounting and General Office) are associated with major expense categories and will be apportioned in the same manner as combined expense in each such category.

285. Space Categories 5, 8 and 11 describe investment that is not related to any access service. Such investment will accordingly be assigned to the interexchange category.

286. Space Category 7 includes garage and storeroom space. Inasmuch as equipment that would be contained in such space is likely to be used primarily for OSP installation and repair that investment will be apportioned in the same proportions as combined OSP investment.

287. Space Category 10 investment (Antenna Support) will necessarily be apportioned in the same proportions as the antenna supported.

288. Most land investment can and will be apportioned in the same manner as the buildings that occupy the land. Storage space is likely to be used in the same manner as garage and storage space in buildings and will accordingly be apportioned in accordance with the same formula. Land other than storage space that is not occupied by a building obviously cannot be related to any particular category. Such investment will be apportioned in the same proportions as combined land investment in the other land categories.

D. *Apportionment of Expenses*

289. Expenses can also be classified as direct or indirect expenses. Certain expenses such as depreciation and maintenance can be directly associated with particular tangible investments in buildings, facilities and equipment. Such expense will be apportioned in the same manner as the associated investment. Property taxes can also be associated with a particular investment and will be apportioned in the same manner.

290. We have concluded that rental payments for the use of a switch or a building, etc., should be apportioned in the same manner that investment would have been apportioned if the carrier owned the equipment or the facility. Therefore, we are also describing such rental payments as direct expense.

291. Indirect expense includes taxes and certain hypothetical taxes that are treated as expenses for ratemaking purposes as well as the expenses in the 600 series of accounts. We have departed somewhat from the separations methodology for apportioning income taxes because that methodology includes some steps that

appear to be unnecessary when charges for almost all the relevant categories are to be targeted to earn the same rate of return.[107] Inasmuch as the income taxes are taxes upon profits and the profits will be directly related to net investment, such tax expense will be apportioned upon the basis of relative net investment.

292. Hypothetical tax expenses, such as expense related to investment tax credits that are claimed for tax purposes, are associated with particular investments. Such expenses and related credits will accordingly be attributed to the associated investment and apportioned in the same manner as such associated investment.

293. Traffic expenses consist primarily of operator activities and will accordingly be apportioned among the three operator elements in the same proportions as the COE 1 investment.

294. A substantial portion of Commercial Expenses are generated by sales and advertising activities that should be excluded from access charges because there is no reason to anticipate that the local exchange carriers will have any reason to advertise exchange access services. We have accordingly assigned expenses in Accounts 642 and 643 to the interexchange category.

295. Commercial expense also includes Connecting Company Relations, Local Commercial expense, Public Telephone Commissions, Directory expenses and other commercial expenses. The public telephone commissions are obviously attributable to the Pay Telephone element and the directory expenses are obviously attributable to the Information element. Local Commercial expense consists primarily of billing and collection activities and will accordingly be assigned to the Billing and Collection element.

296. At the present time a substantial portion of Connecting Company Relations expense is attributable to the administration of the settlements process. That process will be replaced in large part by access charges. Companies will still incur expenses in connection with the computation of access charges and the computation of distributions from access charge revenue pools. We have, however, decided to classify the access charge expenses as revenue accounting expenses for purposes of this expense apportionment. Inasmuch as most of the expenses that will remain in the Connecting Company Relations category will be attributable to interexchange settlements, the Connecting Company Relations expense will be assigned to the interexchange category.

297. The remaining commercial expenses cannot readily be attributed to any category or element. Those expenses will be apportioned in the same proportions as the combined commercial

[107] The separations methodology computes taxable income separately for interstate and intrastate services and uses that ratio to apportion tax expense. That step appears to be necessary for separations purposes because state and federal regulators authorize different returns.

expenses that have been directly assigned to an access element or the interexchange category.

298. Revenue accounting expenses that are not attributable to access charges will be assigned to the Billing and Collection element because such expenses are generated primarily by such activities. We have also established a formula for the allocation of access charge revenue accounting expenses among access charge elements. Most of those expenses will be allocated to end user access elements because the billing and collection of end user charges is likely to generate greater expense.

299. The Big 4 Wage Factor from the *Separations Manual* will be used to apportion certain expenses such as social security taxes and pensions that are closely related to wage expenses. The Big 4 Wage Factor is based upon the wage portion of maintenance, traffic, commercial and revenue accounting expenses.

300. The *Separations Manual* also uses the Big 4 Wage Factor to apportion general office expenses other than engineering expenses. We have concluded that it would be appropriate to use the same factor or this purpose. Inasmuch as engineering expense is related to the equipment and facilities that are used in telephone operations, we have decided to apportion that expense on the basis of the apportionment of the combined direct investment.

301. Although the existing license contracts between AT&T and the BOCs will be terminated before access charges become effective, it will still be necessary to apportion this type of expense because some independents have similar arrangements and the BOC central organization will probably perform some services that AT&T General Departments have performed in the past. We believe expenses for services that are performed by an affiliated company should be apportioned in the same manner as expenses for services that a company performs for itself. We are accordingly requiring that license contract expense be apportioned in that manner.

302. Expenses and income charges and credits that are not included in one of the specific categories described in the rules will be apportioned on an aggregate basis. The Other Investment factor for indirect investment that is not land and building investment will be used for that purpose.

VI. *LEVELS OF AGGREGATION*

A. *Prior Proposals*

303. The tentative plan described in the *Second Supplemental Notice* proposed nationally averaged carrier's carrier access charges and the creation of an access charge revenue pool. Uniform charges necessarily require revenue pooling because different exchange carriers have different costs. Some carriers would be overcompensated and others would be deprived of a compensatory return if each

carrier kept the proceeds from access charges that are computed to reflect the average costs of all carriers.

304. The *Second Supplemental Notice* said that distributions from an access charge revenue pool would reallocate total access charge revenues "among the exchange carriers in order to enable each exchange carrier to receive its interstate exchange plant costs and a share of the residue that reflects its pro rata share of the interstate exchange plant investment." 77 FCC 2d at 233.

305. Some comments that were filed in response to the *Second Supplemental Notice* observed that we did not specify whether distributions taken from a pool would be based upon the authorized or the achieved rate of return. We always contemplated that any pool distributions would be based upon an achieved return although the charges would, of course, be designed to produce revenues that are equal to the authorized revenue requirement.

306. The *Fourth Supplemental Notice* invited comments upon the desirability and feasibility of some alternatives to nationwide uniform charges. One of those alternatives—separate access charges on a state-by-state basis—would have required revenue pooling. The other two alternatives—a separate schedule for a limited number of classes of exchange carriers or a separate schedule for a limited number of classes of exchanges—would not require revenue pooling.

307. All four alternatives were based upon the assumption that all exchange carriers would be participating in common tariff arrangements. We assumed that this would be the case because none of the telephone company comments that were filed in response to the *Second Supplemental Notice* expressed a desire to opt out of such arrangements. Inasmuch as some telephone company comments that were filed in response to the *Fourth Supplemental Notice* do express such a desire, the advantages or disadvantages of the alternatives described in that *Notice* may be academic unless we conclude that we can and should compel unwilling carriers to participate in common tariff arrangements.

B. *Compulsory Common Tariffs*

308. Most comments that discuss the advantages and disadvantages of common tariff arrangements apparently assume that this Commission does have discretion to require averaging or deaveraging, but a few participants have raised questions with respect to the scope of our discretion. Some carriers who do not desire to join in common tariff arrangements apparently believe that any carrier has an absolute right to establish its own rates based on its own costs.[108] Other participants who state that averaging is essential to achieve Communications Act goals contend, or at least imply, that it would

[108] *See* especially Rochester Telephone Corporation Reply, p. 14.

be unlawful for us to permit any carrier to withdraw from averaged common tariff arrangements.

309. No provision of the Communications Act explicitly supports either position. That Act does not expressly require averaged rates and it does not confer any express right to deaverage. Neither this Commission nor the courts have been required to determine whether a carrier has a right to establish separate charges because no carrier has ever attempted to withdraw completely from the uniform MTS rate structure.[109]

310. We believe that our general powers under Section 4(i) of the Act, 47 U.S.C. §154(i), are sufficient to enable this Commission to compel carriers to participate in common tariff arrangements if we find that such arrangements are necessary to accomplish Communications Act goals. Section 4(i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.[110]

311. A rule that requires a common tariff arrangement would not conflict with any express provision of the Act. A rule that makes participation in such arrangements voluntary also would not conflict with any express provision of the Act. Therefore, we do have discretion to compel, or to refrain from compelling, participation in a common tariff arrangement.

312. We believe that our power to compel participation in such arrangements should be used sparingly. A carrier should not be prohibited from pursuing a course that its management believes to be in its best interests unless the public interest requires such a prohibition. A carrier obviously should not be precluded from filing separate access charge tariffs that reflect the costs of that carrier if such a prohibition would produce results that are less consistent with Communications Act goals than results that the filing of a separate tariff would produce.

313. In view of these conclusions we have decided that the advantages and disadvantages of mandatory common tariff arrangements should be examined separately for different groups of access

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[109] Rochester Telephone cites *American Telephone and Telegraph Company v. FCC*, 487 F.2d 864 (2d Cir. 1973) and *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375 (D.C. Cir.), *cert. denied*, 434 U.S. 1040 (1977), to support its claim that it has an absolute right to file its own tariffs. Neither case involved any question with respect to separate or common tariffs. Moreover, the general language with respect to carrier's rights related to revisions of carrier-initiated tariffs that had never been found to be unlawful. Those courts were not describing the scope of the remedial powers we may exercise after we have found that the entire telephone industry has been maintaining an unlawful rate structure.

[110] Those powers have been construed very broadly in the past. *See, e.g., U.S. v. Southwest Cable Co.*, 392 U.S. 197 (1968); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).

elements. We have reached different conclusions for different groups.

314. The Carrier Common Line element was designed in part to mitigate the effects that unlimited deaveraging would produce. Therefore, we believe it is essential to recover those charges through interexchange carrier assessments that are computed on a uniform nationwide basis and to create a pool arrangement for the distribution of such revenues. Our purpose would be frustrated if some exchange carriers recovered the carrier's carrier portion of the Common Line revenue requirement directly from the interexchange carrier. Such a practice could lead to a deaveraging of MTS and other switched service rates that would reflect cost differences among carriers. This would impose burdens upon the customer of high cost or high SPF carriers that the Carrier Common Line charge was designed to avoid.

315. A common tariff arrangement is also necessary at this time because a large portion of the Carrier Common Line revenue requirement will be recovered through the premium access assessment during the early years of the transition. Differences in the quality of interconnection will vary from place to place and from month to month during the transition period. Any effort to measure premium value in a particular exchange in a particular month would create significant administrative burdens for all carriers and for this Commission. We have decided that it would be preferable to compute an annual premium on a national basis that reflects our best estimate of the premium access that will exist during a particular year. It may be impossible to compute a premium access charge in any other manner.

316. The considerations that require a uniform nationwide charge for the carrier's carrier portion do not apply to the end user portion of the Common Line revenue requirement. Premium access is not a factor and separate tariffs for the end user portion need not impose hardships in high cost or high SPF areas.[111] There is accordingly no reason to preclude a carrier from devising its own charges if it wishes to do so.

317. Moreover, a compulsory common tariff arrangement for that element would not only be unnecessary, but would also be undesirable. We have designed transitional rules for End User Common Line charges that give carriers considerable discretion in designing a transition to flat rates for all end users. Flexibility is desirable because different approaches are likely to be appropriate for different carriers in different areas.

318. Our effort to achieve parity among services would be frustrated if a carrier filed a tariff for one or two end user elements

[111] Universal Service Factor costs and transitional SPF costs will, of course, be assigned to the carrier's carrier portion. *See* Subparts III.B and III.C, *supra*.

that reflected its own costs and joined a common tariff for other end user elements that reflected average costs of a group of carriers. Some restriction upon the filing of separate end user tariffs is accordingly necessary in order to achieve the primary objective of this phase of this proceeding. Section 69.3 of our Rules permits a carrier to file a separate tariff for an end user access element if, but only if, that carrier files a separate tariff for all end user access elements.[112]

319. We do not perceive any significant advantage from requiring a common tariff for the other carrier's carrier elements that we have described as traffic sensitive. Any deaveraging of the access charges will not, of course, automatically lead to a deaveraging of the interexchange carrier's end user rates. Even if that result did occur, it appears doubtful that the differentials would be large enough to impose a significant hardship upon end users in particular areas. Present and proposed separations methods for the apportionment of traffic sensitive plant do not create the same kind of discrepancies that are or may be reflected in interstate NTS costs. Therefore, we will not preclude separate tariffs for the traffic sensitive elements.

320. We will, however, preclude a carrier from filing a separate tariff for any traffic sensitive element if the carrier does not file a separate tariff for all traffic sensitive elements. Many of these elements are closely interrelated and a combination of separate and common tariffs for the same carrier could produce anomalous results that are inconsistent with the goals and requirements of the Communications Act.

321. The existence of multi-carrier extended area arrangements also requires a further restriction upon the filing of separate tariffs for traffic sensitive elements. If an extended area arrangement exists an interexchange carrier that interconnects with any local exchange carrier in the extended area necessarily obtains access to the entire extended area. The local exchange carriers are essentially providing a joint access service. Therefore, we will not permit any local exchange carrier to file separate traffic sensitive tariffs for a portion of an extended area. We will permit carriers in an extended area to file a joint tariff for traffic sensitive elements that differs from any national common tariff if all of the participating carriers concur in the rate and agree upon an apportionment of the revenues. Such a joint tariff must, of course, reflect the combined costs of all participating carriers.

322. If carriers in an extended area cannot agree upon a rate for a particular area, common tariff arrangements that have been established nationally will have to be used for that purpose. Such a requirement is necessary to assure that some access charge will be

[112] All of the restrictions upon separate tariffs and deaveraging are described in Section 69. 3.

effective in all areas even if the participating exchange carriers cannot agree upon rates or the division of revenues.

C. *Deaveraging By A Carrier*

323. A separate tariff for end user or traffic sensitive elements might be computed to reflect the average costs of a particular carrier or group of carriers. A tariff could also be devised to reflect greater disaggregation. The comments indicate that a few carriers may wish to file separate tariffs that are highly disaggregated.

324. Our discussion of deaveraging in the *Third Supplemental Notice* noted that past efforts to devise deaveraged rates for a particular carrier or group of carriers have not produced lawful rates. We also concluded that our past decisions have established a policy that precludes selective deaveraging by a carrier in the absence of a showing that such deaveraged rates reasonably approximate actual cost differences. 81 FCC 2d at 194. We said that we would continue to enforce that policy and we noted that Central Submission data submitted by AT&T indicates that AT&T did not have the data that would be necessary to justify a deaveraged rate schedule. 81 FCC 2d at 195.

325. We have not received any information in or out of this record during the intervening two years that would indicate that any carrier is presently in a position to devise highly disaggregated access tariffs that will not create new forms of discrimination. We have, therefore, concluded that unlimited deaveraging within tariffs of a particular carrier or group of carriers should not be permitted at this time.

326. Data that are collected on a study area basis may, however, be sufficient to enable a carrier to justify rate differentials among different study areas. We will, therefore, permit a carrier to file access tariffs with different rates in different study areas if it chooses to do so. Our decision to permit such filings does not, of course, relieve such a carrier of its duty to submit cost support data that will justify any such differentials.

D. *Voluntary Common Tariffs*

327. Most participants in this proceeding agree that exchange carriers who wish to enter into a voluntary common tariff arrangements and a voluntary revenue pool should be permitted to do so. Some participants have, however, observed that any averaging and pooling arrangement has some disadvantages. Some have said that such arrangements do not create incentives for users or carriers that promote economic efficiency.

328. AT&T observed (Comments, p. 71): "Because rate averaging separates prices from local costs, averaging encourages the overuse of the more costly but underpriced facilities and the underuse of the less costly but overpriced facilities."

329. Voluntary common tariff arrangements for access elements other than the Carrier Common Line element would not be likely to produce significant distortions because the lowest cost carriers are likely to withdraw from such pooling arrangements in due course. An access plan that includes such arrangements will probably ultimately produce common tariffs and revenue pools for a large number of relatively small companies that do in fact have comparable costs.

330. Some comments have observed that pooling does not create efficiency incentives for carriers that participate in a pool. For example, Rochester Telephone said (Comments, p. 34):

> If the pooled revenues are distributed according to each carrier's costs, as presumably they would have to be, there is little or no economic incentive to reduce the cost of access under this system. Indeed, an exchange carrier that reduces its costs becomes relatively more disadvantaged, for it receives from the pool a smaller proportion of the interstate revenues contributed by its subscribers to the pool.

331. The present partnership settlements arrangement for BOCs and independent telephone companies that are described as "cost study" companies essentially provides cost plus compensation for each carrier. This method of compensation does appear to create little or no incentive to improve efficiency. Many participants do believe, however, that any access charge revenue pool should be designed to provide a uniform return for all pool participants.[113]

332. Although a uniform common tariff arrangement necessarily requires a revenue pool, it does not inevitably require pool distributions that are based upon the settlements partnership model. It may be possible to create greater efficiency incentives by devising a pool distribution formula that does not guarantee a uniform return for all participants. Since such questions apply to involuntary as well as voluntary pools, we believe this possibility warrants further study. We do not, however, have sufficient information at this time to devise pool distribution rules that differ from the settlements model. The public interest would not be served by delaying initial access charges to devise such an alternative. We have accordingly decided to adopt distribution rules that do follow the settlements model.[114]

333. Rochester Telephone also asserts (Comments, p. 39) that companies that participate voluntarily in a common tariff and pooling arrangement "would run the risk of antitrust liability under the Sherman Act." It appears doubtful that common tariff and

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[113] *See* GTE, p. 23; United Telephone System, Inc., p. 2; Ketchikan Public Utilities, p. 7, Curtis M. Bushnell, p. 21.

[114] The distribution of revenues to carriers that are not average schedule companies is described in Sections 69.607–69.610 of the Rules.

revenue pooling arrangements that are limited to access services could provide a basis for a colorable antitrust claim. The Sherman Act does not prohibit concerted activities, it merely prohibits concerted activities that are likely to produce an unreasonable restraint of trade.

334. We observed in the *Second Supplemental Notice* that such arrangements are unlikely to produce anticompetitive effects. That *Notice* said (77 FCC 2d 235):

> Local exchange facilities are presently provided exclusively on a monopoly basis and carriers providing such service do not compete with each other in the provision of that service. We recognize that this situation may change with time as improving technology (*e.g.*, direct satellite, cellular radio) makes exchange competition more economically feasible. However, these changes will not occur in the short run. (footnote omitted).

335. Access service competition between the carriers that are likely to participate in a pool is not likely to occur even in the more distant future. Alternative access that bypasses wireline facilities of a local exchange carrier is likely to be offered in conjunction with an interexchange service. Therefore, a local exchange carrier is not likely to be providing bypass in the franchise area of another local exchange carrier if that carrier is not providing interexchange services. The MFJ bars the divested BOCs from the interexchange market and most smaller independents do not have the means to enter that market. One can imagine large independents offering bypass services in BOC exchanges, but the BOCs are not likely to remain in any pools by the time that becomes a realistic possibility. Therefore, any common tariff and pooling arrangements that we are mandating or permitting cannot be viewed as price-fixing or profit-pooling by actual or potential competitors in an access service market.

336. The Justice Department apparently shares our perception of the competitive implications of voluntary access pools. The Justice Department comments do not oppose voluntary common tariffs or voluntary pools as such.

337. Such voluntary arrangements not only do not have disadvantages that would warrant a prohibition, but also have important advantages. The telephone industry is composed of a limited number of large companies that serve over 90% of the local exchange subscribers and a very large number of small companies that serve the remaining subscribers. Most of these smaller companies have never filed any tariff of any kind with this Commission. It would be totally unrealistic to expect such companies to prepare and justify separate tariffs in accordance with the rules we are adopting in this *Report and Order*. It would also be unrealistic to suppose that this Commission could review 1500 access tariffs in a meaningful manner if they did choose to do so. A common tariff arrangement that most

of the exchange carriers can use is clearly necessary to make any access charge rules work. Such arrangements would, therefore, presumably be immune from antitrust sanctions because they are necessary to make the regulatory scheme work even if this Commission did not mandate or sponsor such arrangements. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

338. The involuntary arrangements for universal service charges should not, of course, present any antitrust question because participation in those arrangements would be the product of regulatory coercion.[115]

E. *Creation of the Association*

339. A voluntary or involuntary common tariff arrangement necessarily requires that some entity compute the charges and prepare and justify the tariffs on behalf of all the participating carriers. A revenue pool requires that some entity compute the distributions that each participant is entitled to receive from the pool.

340. In the past AT&T has acted as a tariff filing agent for the entire industry and has also performed most of the administrative functions in connection with the settlements pooling arrangement. The AT&T role as a tariff filing agent is implicitly recognized in Section 203(a) of the Act. Section 203 requires every common carrier "except connecting carriers" to file tariffs with this Commission for interstate and international services. It also requires that the tariffs describe charges between points on the carrier's system and between points on the carrier's system and "points on the system of its connecting carriers." This essentially relieved a "connecting carrier" of the burden of filing its own tariffs with this Commission and imposed that burden upon the carrier that is not described as a "connecting carrier." The term "connecting carrier" encompasses most independent telephone companies and probably encompassed almost all non-Bell companies when the Act was adopted. Thus, Congress effectively made AT&T a tariff filing agent for the entire industry.

341. The *Fourth Supplemental Notice* invited comment on a proposal to create a new intra-industry entity to perform the tariff filing and pool distribution functions because such an AT&T role in the post-divestiture environment would appear to conflict with the spirit, and possibly the letter, of the then proposed consent decree. Most comments from participants who do not oppose any common tariff or pooling arrangement have endorsed the industry association concept.

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[115] The decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), would not be analogous because the regulatory coercion in the rules we are adopting does not have the same *pro forma* character as the actions of the Michigan Commission.

342. A few comments have questioned the desirability or legality of Commission action to mandate the creation of such an association. Such participants apparently believe that we should allow institutional arrangements for common tariffs and pools to emerge spontaneously. We do not believe that would be a feasible option if an access charge system is to be in place by the beginning of 1984. Such an association must have a functioning organization by the time the divestiture occurs. We necessarily must mandate the creation of an exchange carrier association and adopt some rules with respect to its organization and functions in order to ensure that an access charge system will work.[116]

343. Rochester Telephone has questioned our authority to mandate the creation of such an association and has described such an action as a delegation of powers to a private organization. Comments, p. 39; Reply, p. 13. We do not believe it would be appropriate to describe our action as a "delegation" because the preparation of tariffs and the administration of revenue pools is not a governmental function. It would probably be more accurate to describe our action as an exercise of our Section 203(b)(2) power to modify the requirements of Section 203 by creating a new entity to perform functions that Section 203(a) assigned to AT&T. If we failed to exercise our power to transfer such functions from AT&T to a new entity we would be creating an unnecessary conflict between the regulatory scheme and the MFJ. Moreover, as previously noted, the creation of such an association is essential to the success of an access charge system and is accordingly within our Section 4(i) power to issue orders that are necessary to the performance of our statutory functions.

344. Although the Justice Department did not oppose common tariffs or voluntary pooling of access charge revenues, the Department has expressed the view that this Commission should not sponsor a carrier association. That view may reflect a concern that a Commission-sponsored association could become a vehicle for other concerted activities that might have anti-competitive implications. We feel that such activities are unlikely. Nevertheless, we have decided that we should impose some restrictions upon the scope of the association's activities. We will preclude the association from engaging in activities that are not directly related to the preparation of access charge tariffs or the distribution of access charge revenues unless such additional activities are expressly authorized by this Commission. We will, of course, expect the association to seek prior approval for any additional association activities.

F. *Organization of the Association*

345. We have concluded that membership in the association

[116] Those rules are set forth in Subpart G.

should be limited to exchange carriers that participate in access charge revenue pools that are administered by the association and that the governing board should be composed exclusively of exchange carrier representatives. Although the *Fourth Supplemental Notice* invited comment upon the advisability of including a Commission representative on the association board, further reflection leads us to conclude that it would be unwise to do so. This Commission will be obliged to review the tariffs that the association files and to determine the merits of any petitions to investigate, suspend or reject such tariffs. An appearance of a conflict of interest might be created if a Commission representative participated in the association decisions that might be challenged in such proceedings. We have also decided not to accept suggestions that state commissions, interexchange carriers or consumers be represented on the governing board of the association. As we stated in the *Fourth Supplemental Notice*, "the Communications Act already provides safeguards adequate to protect the interests of these groups in the fair, evenhanded implementation of any access charge plan we might adopt." 90 FCC 2d at 150.

346. We have concluded that we should adopt a rule describing the membership of the governing board in order to establish appropriate representation for different classes of carriers. We are not, however, adopting that rule at this time. We will issue a supplemental order in this docket adopting such a rule and prescribing some organizational steps after the notice period expires for carriers that may choose not to participate in common tariffs for 1984.[117]

347. We do not plan to adopt rules that would restrict the association's discretion in acquiring staff or borrowing staff from its members or contracting with accounting firms, banks or others to perform some of the association's tasks. The observation in the *Fourth Supplemental Notice* that the BOC central organization might continue to perform many tariff preparation and pool distribution functions that have traditionally been performed by AT&T personnel was presented as a possible solution to staffing problems the association may encounter. We do not believe, and have never believed, that it would be necessary or desirable for this Commission to prescribe the staffing arrangements the association would be required to adopt.

348. The association will be responsible for filing the Carrier

[117] We do not plan to invite further supplemental comments before we issue that supplemental order.

Common Line tariffs and common tariffs for every other access element for those carriers that choose to join in association tariff[118] In general, carriers may choose to participate in common tariffs for the end user elements or the traffic sensitive carrier's carrier elements or both. In order to enable the association to adjust its tariffs to reflect the costs of carriers that do choose to participate in common tariffs, we shall require that any exchange carrier that does not desire to participate in a common tariff provide ample advance notice that it has chosen to file a separate tariff.

349. The costs of managing the pooling and distribution, along with the costs of actually filing tariffs, are to be included among costs recovered through association charges.

G. *AT&T Role in Preparation of Initial Tariffs*

350. It appears doubtful that the association could have an organization in place in sufficient time to prepare the initial access service tariffs that must be filed by October 3, 1983. We have accordingly decided that AT&T should continue to perform its traditional role in the preparation of tariffs for the telephone industry until the initial access charge tariff is ready for filing.[119] AT&T should, of course, respond to policy directives from the association directors when a governing board has been selected.

351. AT&T participation in the preparation of the initial access charge tariffs would probably be necessary even if the association could create a functioning organization immediately. AT&T will necessarily be required to file new end user tariffs for interstate and international services in order to reflect the effect of the access charges. In view of the magnitude of the changes that the implementation of initial access charges will produce, access charges and new end user charges for interexchange services should become effective simultaneously. We could not responsibly permit massive changes in end user rates to become effective upon less than 90 days notice and it appears doubtful that we could require more than 90 days notice for access tariff filings. In these circumstances, coordination in the development of access charge tariffs and new end user tariffs for AT&T services is essential to ensure a smooth transition.[120]

352. Such coordination problems should not be as significant in subsequent years because the changes in access charges probably

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[118] This will, of course, take the form of a single tariff with multiple elements. We will permit carriers who do not join some elements to cross-reference the association tariff for elements such carriers join.

[119] Inasmuch as the association will be relieving AT&T of burdens imposed by Section 203, we expect that AT&T will lend funds to the association to permit it to function until it receives a disbursement from access charge revenues.

[120] End user rates of other interexchange carriers will undoubtedly also be changed to reflect access charges. We do not, however, expect to require 90 days notice from those carriers.

will not be significant enough to require simultaneous changes in end user rates. It should be possible to achieve a smooth transition by mandating an AT&T role in the preparation of common tariffs for access charges that ends when the initial access charges are filed. We do not envision, mandate or sanction any AT&T role in the preparation of access charge tariffs or the distribution of access charge revenues after divestiture of the BOCs occurs.

353. The Justice Department comments indicate that the Department does not object to a pre-divestiture AT&T role in the preparation of access charge tariffs. We accordingly assume that the procedure we envision will not conflict with the letter or the spirit of the MFJ.

354. The preparation of the initial access charge tariffs will undoubtedly be a difficult task. In order to enable AT&T to begin collecting the necessary data, we are making this *Order* effective on the day after the date of publication in the *Federal Register*. We have decided to require exchange carriers that choose to file any separate tariffs for 1984 to notify AT&T of their decision within 40 days after the release of this *Report and Order*. We are also requiring that AT&T notify all the affected carriers that this notice requirement exists within 10 days of the release of this *Report and Order*.

355. It is vitally important that acceptable access tariffs become effective by the day on which divestiture of the BOCs occurs. We therefore feel compelled to monitor the progress of access charge preparation. To this end, we require AT&T to file progress reports until the initial access charges have been filed. The first report will be filed 8 weeks after the release of this *Report and Order* and subsequent reports will be filed at 6-week intervals.

356. We also expect that AT&T and any carrier that may choose to file a separate tariff will file petitions for waiver if shortcuts must be used to adapt readily available data to the methods we are prescribing for the computation and assessment of access charges. We recognize that some carriers will not be able to provide all of the data that would be required and that some kind of sample procedure will be necessary to develop data for average schedule companies. The filing of such waiver petitions will provide an additional opportunity to monitor the progress of access charge preparation.[121]

357. We believe the procedures we are adopting will achieve the purposes of this proceeding without imposing undue burdens upon any carrier or creating administrative burdens that exceed the capabilities of our staff.[122]

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[121] The Chief of the Common Carrier Bureau will, of course, act upon any waiver petitions that do not present fundamental policy questions that require a Commission decision.

[122] We have necessarily been obliged to impose some restrictions upon the options of carriers that do not choose to join in common tariffs in order to prevent the filing

H. *Regulatory Flexibility Certification*

358. For the following reasons, we certify that the Regulatory Flexibility Act is not applicable to the rules we are adopting in this proceeding.

359. A few of the comments have questioned the adequacy of the initial regulatory flexibility analysis in the *Fourth Supplemental Notice*.[123] The Regulatory Flexibility Act is not literally applicable to this proceeding. That Act was apparently designed for the protection of small businesses that are directly subject to administrative rules rather than businesses that are indirectly affected by the results that any rules will produce. The access charge rules are, of course, imposed upon the local exchange carriers that will be required to compute and collect access charges in accordance with those rules. Those carriers are accordingly the only businesses that might be entitled to claim some protection under that Act.

360. Although some local exchange carriers are very small, no telephone company appears to fall within the Regulatory Flexibility Act's very special definition of a "small entity." That Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as a definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. This Commission has found all exchange carriers to be dominant in the *Competitive Carrier Rulemaking*, 85 FCC 1, 23–24 (1980). Indeed the smallest exchange carriers are probably even more dominant than the large ones because bypass competition is very unlikely to develop in the areas they serve.

361. Although the Regulatory Flexibility Act is not applicable to this proceeding, Congress did express essentially the same policy objective in the Communications Act. Sections 2(b) and 203(a) of the 1934 Act were designed to relieve most small telephone companies from many reporting and other burdens that the Act imposed upon AT&T.

362. We recognize that we cannot and should not expect a telephone company with eight employees to do everything that Pacific Telephone is expected to do. We have designed the access charge rules to minimize the administrative burdens that are imposed upon smaller companies. We have mandated the creation of an association that will perform tariff preparation and pool distribution functions and we have designed requirements for those func-

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of tariffs that could not be adequately reviewed. For example, the rules we are adopting preclude tariffs that are disaggregated within a study area. We may relax such restrictions in the future after we have acquired more experience with access service tariffs.

[123] *See* especially Small Business Administration comments.

tions that will adapt the existing average schedule settlements procedures to an access charge system. We believe that we have complied fully with the requirements of the Communications Act and the spirit of the Regulatory Flexibility Act.

VII. *CONCLUSION*

363. We emphasize how difficult and how important has been the task of devising an access charge plan. In this proceeding, we have focused on the present and the future rather than the past. The monopoly telecommunications environment of the past has ended. The approaches taken in the past to balance the four goals of universal service, non-discriminatory, cost-based prices and a viable, efficient telecommunications network—goals which we believe have been the aim of the Communications Act since its passage—are no longer appropriate. These past approaches have essentially been nothing more than the development of special, discriminatory rates for different customers making identical use of access plant in interstate service. It is readily apparent that in an era of facilities-based competition and resale such approaches are not viable. Any attempt to insure continued support for local telephone service through the prohibition of bypass systems would lead to a stifling of innovation and, quite probably, to the transformation of the nation's telephone system—currently the best in the world—into an outmoded and technically inefficient system. Such a system would almost certainly be unable to attract sufficient capital to maintain, much less upgrade, the system.

364. In our *Fourth Supplemental Notice* we put forth for comment four differing approaches to the resolution of the principal question in the access charge docket. These were not presented as specific plans subject to a vote of the parties. Rather they were propounded as examples of the types of plans which could be developed. In issuing that *Notice* we hoped that participants would propose methods to combine or improve upon the simplistic approaches we described. Our hope was well justified. The comments filed by participants in this proceeding have, in overwhelming measure, been constructive and of tremendous value to us in fulfilling our task. Our task, we state once again, is to devise that access charge plan which best balances the many objectives of the Communications Act.

365. The plan we adopt today is largely based upon those comments. It recognizes both the need for some national averaging and the clear advantages of disaggregation when such disaggregation is desired by the carriers and is in the public interest. It clearly recognizes the need for a smooth transition from the existing system of discriminatory but largely usage based carrier charges to a new system relying chiefly upon flat customer charges. Such a movement is, in our opinion, necessary to serve the public interest and to insure

the maintenance of our nationwide network of telephone service. Despite this we have, through our plan, insured that universal service will not be eliminated. The inclusion of a permanent, nationally averaged, carrier's pool to direct revenues to high cost areas is a central feature of this plan. We have not been limited by the traditional division between "traffic sensitive" and "non-traffic sensitive" costs in determining which costs should ultimately be placed upon individual customers. Rather, we have attempted to differentiate network functions, which may appropriately be recovered through carrier's carrier charges, from end user service, which can only be ordered by end users, which is dedicated to individual end users, and which must, in our opinion, be recovered from those end users.

366. We have directed the Common Carrier Bureau to develop a monitoring function to insure that the changes that will result from this *Report and Order* do not impair universal service. Such a monitoring function must and will be in place before the institution of access charges. Along with our transition plan, this will insure that, should unforeseen circumstances arise, we have an ample opportunity to act before irreparable harm to the universal character of telephone service takes place. We now commit ourselves to taking such action should, contrary to our expectations, it be necessary. Such actions might include adjusting end user flat charges, adjusting the Universal Service Fund, adjusting the degree of nationwide pooling, or requiring that certain transitional benchmarks be met.

367. Finally, we have provided a two-year period after individual phone companies are responsible for collecting most dedicated NTS costs from their subscribers before equal flat customer access charges will be required. We recognize that during the transition period some telephone companies may develop mechanisms for recovering those costs from their customers which will better balance the four goals of the Communications Act than can a single national plan. We will conduct a further notice and comment phase of this proceeding in the fifth year and will evaluate nationwide and local effects of the transition before proceeding with the final steps in the transition plan. We recognize that a plan that may be ideal for most of the country may not be ideal for all of the country. This *Report and Order* recognizes that individual carrier flexibility is fully consistent with the Communications Act. We expect to work with State regulatory commissions, and State legislatures, during the transition period to continue to seek better ways to reconcile the need for an efficient, cost-based recovery scheme with the need for a universal telephone system and to harmonize our efforts so as not to frustrate the achievement of our policies and objectives.

368. The task we have faced in designing our access charge plan has been, perhaps, the most difficult ever to come before the

Commission. It is also, quite probably, the most important to have come before us. The correct resolution of this phase of this docket is an essential prerequisite for the development of meaningful competition in interstate telecommunications, for the assurance that common carrier telecommunications can play the central role in our nation's economy and, indeed, in the world economy that is warranted by its value to citizens and by its unique characteristic of being substitutable for a wide variety of goods and services. No one, and no commission, can predict the future of telecommunications with any degree of certainty. Our access charge plan is, in our opinion, the best plan for the present and immediate future that can be devised based upon our present level of knowledge. We remain committed to careful monitoring of developments in the field of common carrier telecommunications and to making any adjustments that may be warranted, based upon these future developments, to serve the public interest.

VIII. *ORDERING CLAUSES*

369. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. §§154(i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. §553, Part 69 IS ADDED to the Rules of this Commission as set forth in the attached Appendix A, effective on the date following publication in the *Federal Register*.

370. IT IS FURTHER ORDERED, That each revenue requirement that is computed in accordance with such rules shall be based upon a 12.75% return until further order of this Commission.

371. IT IS FURTHER ORDERED, That in accordance with the rules in Appendix A and the directives of this *Report and Order*, AT&T shall prepare the initial tariffs for interstate access services provided by members of telephone company association and shall file these tariffs no later than October 3, 1983.

372. IT IS FURTHER ORDERED, That AT&T file reports describing its progress in preparing these initial access tariffs with the Chief, Common Carrier Bureau. These reports shall continue until AT&T has filed the initial access tariffs. The first report shall be filed eight (8) weeks after the release of this *Report and Order*. Subsequent reports shall be filed thereafter at six (6) week intervals.

373. IT IS FURTHER ORDERED, That within ten (10) days of the release of this *Report and Order* AT&T shall notify each telephone company that has participated in the division of revenues or settlements process that the company is required to decide whether to file any tariffs separate from those filed by the association and to notify AT&T of its decision.

374. IT IS FURTHER ORDERED, That each telephone company that has participated in the division of revenues or settlements process shall notify AT&T of its decision to file any separate tariffs within forty (40) days of the release of this *Report and Order*.

375. IT IS FURTHER ORDERED, That the Petition for Evidentiary Hearing of the United States Transmission Systems, Inc. filed on June 26, 1980, IS DENIED.

376. IT IS FURTHER ORDERED, That the Motions for Leave to File Late Comments filed by the Federal Executive Agencies and the Council on Wage and Price Stability ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION*
WILLIAM J. TRICARICO *Secretary*

NOTE: Appendices B, C, D, E, F, G and attachments are available for public inspection in FCC Dockets Branch, Room 239 and FCC Library, Room 639, 1919 M Street, N.W., Washington, D.C. 20554.

APPENDIX A

Part 69 is added to Chapter I of Title 47 of the Code of Federal Regulations to read as follows:

Part 69. Access Charges

Subpart A: - General

Sec. 69.1. Application of access charges.

Sec. 69.2. Definitions.

Sec. 69.3. Filing of access service tariffs.

Sec. 69.4. Charges to be filed.

Subpart B: - Computation of Charges

Sec. 69.101. General.

Sec. 69.102. Dedicated Access Line.

Sec. 69.103. Pay Telephone.

Sec. 69.104. End User Common Line.

Sec. 69.105. Carrier Common Line.

Sec. 69.106. Line Termination.

Sec. 69.107. Local Switching.

Sec. 69.108. Intercept.

Sec. 69.109. Information.

Sec. 69.110. Operator Assistance.

Sec. 69.111. Common Transport.

Sec. 69.112. Dedicated Transport.

Sec. 69.113. Special Access.

Sec. 69.114. Billing and Collection.

Subpart C - Computation of Transition Charges

Sec. 69.201. General.

Sec. 69.202. End User Common Line charges.

Sec. 69.203. Minimum charges.

Sec. 69.204. Usage charges.

Sec. 69.205. Maximum charges.

Sec. 69.206. Transitional surcharges.

Sec. 69.207. Premium Access.

Sec. 69.208. Transitional Carrier Common Line.

Subpart D - Apportionment of Net Investment

Sec. 69.301. General.

Sec. 69.302. Net investment.

Sec. 69.303. Station equipment.

Sec. 69.304. Customer OSP.

Sec. 69.305. Carrier OSP.

Sec. 69.306. Central office equipment.

Sec. 69.307. Buildings.

Sec. 69.308. Land.

Sec. 69.309. Other investment.

Subpart E - Apportionment of Expenses

Sec. 69.401. Direct expenses.

Sec. 69.402. Current taxes.

Sec. 69.403. Deferred tax expenses.

Sec. 69.404. Traffic expenses.

Sec. 69.405. Commercial expenses.

Sec. 69.406. Revenue Accounting expenses.

Sec. 69.407. General Office expenses.

Sec. 69.408. Relief and Pensions.

Sec. 69.409. License Contract expenses.

Sec. 69.410. Other expenses.

Subpart F - Segregation of Common Line Element Revenue Requirement

Sec. 69.501. General.

Sec. 69.502. Base factor apportionment.

Sec. 69.503. Apportionment of transitional portion.

Subpart G - Exchange Carrier Association

Sec. 69.601. Exchange carrier association.

Sec. 69.602. Board of directors.

Sec. 69.603. Association functions.

Sec. 69.604. Billing and collection of access charges.

Sec. 69.605. Distribution of Carrier Common Line revenues.

Sec. 69.606. Computation of average schedule company payments.

Sec. 69.607. Disbursement of Carrier Common Line residue.

Sec. 69.608. Carrier Common Line hypothetical net balance.

Sec. 69.609. End User Common Line hypothetical net balances.

Sec. 69.610. Other hypothetical net balances.

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

69.1. Application of access charges.

(a) This Part establishes rules for access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984.

(b) Charges for such access services shall be computed, assessed and collected and revenues from such charges shall be distributed as provided in this Part. Access service tariffs shall be filed and supported as provided under Part 61 of this chapter, except as modified herein.

69.2. Definitions.

For purposes of this Part:

(a) "Access Service" includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication that is subject to regulation pursuant to Title II of the Communications Act or provided for the origination or termination of any interstate or foreign enhanced service that is exempt from tariff regulation pursuant to Subpart G of Part 64 of this chapter;

(b) "Annual revenue requirement" means the sum of the return component and the expense component;

(c) "Association" means the telephone company association described in Subpart G of this Part;

(d) "Big 4 Wage Factor" means that ratio of combined wage expense except building maintenance wage expense attributable to general office space in the following expense categories:

(1) Maintenance;

(2) Traffic;

(3) Commercial; and

(4) Revenue Accounting;

(e) "Buildings" includes investment that is described as building investment in the *Separations Manual*;

(f) "Carrier Outside Plant" or "Carrier OSP" means all outside plant that is not Customer OSP;

(g) "Central Office Equipment" or "COE" includes all equipment or facilities that are described as Central Office Equipment in the *Separations Manual*;

(h) "Commercial Expenses" includes all expenses that are described as Commercial Expenses in the *Separations Manual*, except for any expense incurred in computing, billing or collecting access charges which shall be deemed to be Revenue Accounting expense;

(i) "Current taxes" includes taxes other than property taxes that are actually accrued during the relevant period less credits attributable to past deferrals and does not include hypothetical taxes that are allowable expenses for ratemaking purposes or taxes assessed upon end users;

(j) "Customer Outside Plant" or "Customer OSP" means all lines or trunks on the customer side of a Class 5 or end office switch, including lines or trunks that do not terminate in such a switch, except lines or trunks that connect an interexchange carrier or enhanced service provider facility with such a switch;

(k) "Dedicated access line" means a WATS access line or a private line that does not terminate in customer premises equipment that is used exclusively for a particular interexchange service;

(l) "Direct Expense" means expenses that are attributable to a particular category of tangible investment described in Subpart D of this Part and includes:

(1) Maintenance;

(2) Depreciation and amortization;

(3) Rental payments for buildings, facilities or equipment; and

(4) Property taxes;

(m) "End user" means any customer of an interstate or foreign telecommunications service or enhanced service that is not a carrier or enhanced service provider except that a carrier other than a telephone company or an enhanced service provider shall be deemed to be an "end user" when such carrier or enhanced service provider uses a telecommunication service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller;

(n) "Entry switch" means the telephone company switch in which a dedicated transport line or trunk terminates;

(o) "Expense component" means the total expenses and income charges for an annual period that are attributable to a particular element or category;

(p) "Expenses" include allowable expenses in the 600 series of the Uniform System of Accounts apportioned to interstate or international services pursuant to the *Separations Manual* and allowable income charges apportioned to interstate and international services pursuant to the *Separations Manual*;

(q) "General Office Expenses" includes Executive (Account 661) expense, Treasury (Account 663) expense, Law (Account 664) expense, Other General (Account 665) expense and the portion of Accounting (Account 662) expense that is not Revenue Accounting expense;

(r) "Interexchange" or the "interexchange category" includes services or facilities provided as an integral part of an interstate or foreign telecommunications or an

interstate or foreign enhanced service that is not described as "access service" for purposes of this Part;

(s) "License contract" means an agreement to reimburse an entity that is jointly owned by telephone companies or companies that own telephone companies or an entity that directly or indirectly controls or is controlled by, or is under direct or indirect control with, a telephone company, for services, facilities, patents or other know-how;

(t) "Line" or "trunk" includes transmission facilities such as microwave towers, satellites, earth stations, etc. as well as wire and cable;

(u) "Net investment" means allowable original cost investment in Accounts 100.1–100.4 and 122 that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* from which depreciation, amortization and other reserves attributable to such investment that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* have been subtracted and to which working capital that is attributable to interstate and foreign services has been added;

(v) "Origination" of a service that is switched in a Class 4 switch or an interexchange switch that performs an equivalent function ends when the transmission enters such switch and "termination" of such a service begins when the transmission leaves such a switch, except that:

(1) Switching in a Class 4 switch or transmission between Class 4 switches that is not deemed to be interexchange for purposes of the Modified Final Judgment entered August 24, 1982, in *United States v. Western Electric Co.*, D.C. Civil Action No. 82–0192, will be "origination" or "termination" for purposes of this Part, and;

(2) "Origination" and "termination" does not include the use of any part of a line, trunk or switch that is not owned or leased by a telephone company;

(w) "Origination" of any service other than a service that is switched in a Class 4 switch or a switch that performs an equivalent function ends and "termination" of any such service begins at a point of demarcation that corresponds with the point of demarcation that is used for a service that is switched in a Class 4 switch or a switch that performs an equivalent function;

(x) "Outside Plant" or "OSP" includes all equipment or facilities that are described as outside plant in the *Separations Manual*;

(y) "Private line" means a line that is used exclusively for an interexchange service other than MTS or WATS, including a line that is used at the closed end of an FX or CCSA service or any service that is substantially equivalent to a CCSA service;

(z) "Return component" means net investment attributable to a particular element or category multiplied by the authorized annual rate of return;

(aa) "Revenue Accounting Expenses" includes all expenses that are described as Revenue Accounting Expenses in the *Separations Manual* and expenses associated with the preparation of access charge tariffs and the distribution of access charge revenues;

(bb) "Station equipment" includes all equipment or facilities that are described as station equipment in the *Separations Manual* except station equipment that is used by telephone companies in their own operations;

(cc) "Telephone company" means a carrier that provides telephone exchange service as defined in Section 3(r) of the Communications Act of 1934;

(dd) "Traffic Expenses" includes all expenses that are described as traffic expenses in the *Separations Manual*;

(ee) "Unit of capacity" means the capability to transmit one conversation; and

(ff) "WATS access line" means a line or trunk that is used exclusively for WATS service.

69.3. Filing of access service tariffs.

(a) A tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days notice, with a scheduled effective date of January 1.

(b) The requirement imposed by paragraph (a) of this Section shall not preclude the filing of revisions to those annual tariffs that will become effective on dates other than January 1.

(c) Any access service tariff filing, the filing of any petitions for rejection, investigation or suspension and the filing of any responses to such petitions shall comply with the applicable rules of this Commission relating to tariff filings.

(d) The association shall file a tariff as agent for all telephone companies that participate in an association tariff.

(e) A telephone company or group of telephone companies may file a tariff that is not an association tariff. Such a tariff may cross-reference the association tariff for some access elements and include separately computed charges of such company or companies for other elements. Any such tariff must comply with the requirements hereinafter provided:

(1) Such a tariff must cross-reference association charges for the Carrier Common Line element or elements if such company or companies participate in the distribution of revenues from such elements;

(2) Such a tariff that cross-references an association charge for any end user access element or the transitional surcharge must cross-reference association charges for all end user access elements and the transitional surcharge;

(3) Such a tariff that cross-references an association charge for any carrier's carrier access element other than the Carrier Common Line element or elements and the transitional surcharge must cross-reference association charges for all carrier's carrier access charges other than the Carrier Common Line element or elements and the transitional surcharge;

(4) Any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

(5) A telephone company or companies that elect to file such a tariff for 1984 access charges shall notify AT&T on or before the 40th day after the release of the Commission order adopting this Part;

(6) A telephone company or companies that elect to file such a tariff for any year subsequent to 1984 shall notify the association not later than June 30 of the preceding year if such company or companies did not file such a tariff in such preceding year or cross-referenced association charges in such preceding year that will not be cross-referenced in the new tariff;

(7) Such a tariff shall not contain charges for any access elements that are disaggregated or deaveraged within a study area that is used for purposes of jurisdictional separations;

(8) Such a tariff for a company that provides extended area local exchange telephone service shall not establish any charge for a carrier's carrier access element that does not apply to the entire extended area; and

(9) Such a tariff shall not include a charge other than an association charge for an extended area that is served by two or more telephone companies without the concurrence of all telephone companies that serve such extended area.

69.4. Charges to be filed.

(a) The end user charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Dedicated Access Line;

(2) Pay Telephone; and

(3) End User Common Line.

(b) Except as provided in Subpart C of this Part, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Carrier Common Line;

(2) Line Termination;

(3) Local Switching;

(4) Intercept;

(5) Information;

(6) Operator Assistance;

(7) Common Transport;

(8) Dedicated Transport; and

(9) Special Access.

(c) The carrier's carrier charges for carriers that offer a billing and collection or billing information service shall also include a Billing and Collection element.

Subpart B: Computation of Charges

69.101. General.

Except as provided in Subpart C of this Part, charges for each access element shall be computed and assessed as provided in this Subpart.

69.102. Dedicated Access Line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users for each interstate or foreign dedicated access line.

(b) Such charge will be computed by dividing one-twelfth of the projected annual revenue requirement for the Dedicated Access Line element by the projected average number of interstate or foreign dedicated access lines in use during such annual period.

69.103. Pay Telephone.

(a) A charge that is expressed in dollars and cents per call shall be assessed upon end users for each interstate or foreign call that is placed from a pay telephone, except that collect or third number billing calls will not be assessed.

(b) Such charge shall be computed by dividing the projected annual revenue requirement for the Pay Telephone element by the projected annual number of calls that are subject to assessment.

69.104. End User Common Line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service. Such charge shall be assessed for each line between the premises of an end user and a Class 5 office that is or may be used for local exchange service transmissions.

(b) Charges to multi-line subscribers shall be computed by multiplying a single line rate by the number of lines used by such subscriber.

(c) Charges to party line subscribers shall be computed by dividing a single line rate by the number of users that share such line.

(d) The single line rate or charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the End User Common Line element by the projected average number of local exchange service subscriber lines in use during such annual period.

69.105. Carrier Common Line.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Carrier Common Line element by the projected annual conversation minutes for all interstate or international services that use local exchange switching facilities. Each minute of use of any local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

69.106. Line Termination.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange facilities for the provision of interstate or foreign telecommunications services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Line Termination element by the projected annual conversation minutes for all interstate or foreign services that use local exchange switching facilities. Each minute of use of any termination in a local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

69.107. Local Switching.

(a) Charges that are expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services.

(b) Separate charges shall be established for two categories of service. The first category, or LS 1, shall consist of local dial switching for services other than MTS or WATS that is provided through a line side termination in a Class 5 switch or through a termination in a local tandem switch. The second category, or LS 2, shall consist of local dial switching for MTS and WATS and local dial switching for a service other than MTS or WATS that is provided through a trunk side termination in a Class 5 switch.

(c) The projected annual revenue requirement for Local Switching shall be apportioned between LS 1 and LS 2 on the basis of weighted relative usage. LS 1 dial equipment minutes shall be counted as one. LS 2 dial equipment minutes shall be

multiplied by the Toll Weighting Factor or TWF that is used for jurisdictional separations purposes to allocate investment in a particular type of switch.

(d) A per minute charge for the LS 1 category shall be computed by dividing the LS 1 portion of the annual revenue requirement by the projected annual LS 1 conversation minutes.

(e) A per minute charge for the LS 2 category shall be computed by dividing the LS 2 portion of the projected annual revenue requirement by the projected annual LS 2 conversation minutes.

(f) If end users of an interstate or foreign service that uses local switching facilities pay message unit charges for such calls in a particular exchange, a credit shall be deducted from the Local Switching element charges to such carrier for access service in such exchange. The per minute credit for each such exchange shall be multiplied by the monthly conversation minutes for such service to compute the monthly credit to such a carrier.

(g) If all local exchange subscribers in such exchange pay message unit charges, the per minute credit described in paragraph (f) of this Section shall be computed by dividing total message unit charges to all subscribers in a particular exchange in a representative month by the total minutes of use that were measured for purposes of computing message unit charges in such month.

(h) If some local exchange subscribers pay message unit charges and some do not, a per minute credit described in paragraph (f) of this Section shall be computed by multiplying a credit computed pursuant to paragraph (g) of this Section by a factor that is equal to total minutes measured in such month for purposes of computing message unit charges divided by the total local exchange minutes in such month.

69.108. Intercept.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange facilities for the provision of interstate or foreign telecommunication services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Intercept element by the projected annual conversation minutes for all interstate or foreign services that use local exchange switching facilities.

69.109. Information.

(a) A charge shall be assessed upon all interexchange carriers that are connected to assistance boards through interexchange directory assistance trunks.

(b) If such connections are maintained exclusively by carriers that offer MTS, the projected annual revenue requirement for the Information element shall be divided by 12 to compute the monthly assessment to such carriers.

(c) If such connections are provided to additional carriers, charges shall be established that reflect the relative use of such directory assistance service by such interexchange carriers.

69.110. Operator Assistance.

(a) A charge shall be assessed upon all interexchange carriers that offer an operator-assisted service that uses local exchange switching facilities and uses the services of telephone company operators.

(b) If such service is provided exclusively to the carriers that offer MTS, the projected annual revenue requirement for the Operator Assistance element shall be divided by 12 to compute the monthly assessment to such carriers.

(c) If such a service is provided to additional carriers a charge that is expressed in dollars and cents per call shall be assessed upon each carrier that receives such a service.

(d) Such a per call charge shall be computed by dividing the projected annual revenue requirement for the Operator Assistance revenue requirement by the projected annual number of operator-assisted calls.

69.111. Common Transport.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment.

(b) The per minute charge shall be weighted by a distance factor that reflects the airline distance between the Class 5 or end office switch that serves an end user and the entry switch.

(c) Charges shall be designed to produce annual revenue that is equal to the projected annual revenue requirement for the Common Transport element.

69.112. Dedicated Transport.

(a) The projected annual revenue requirement for Dedicated Transport shall be divided into three parts. The revenue requirement shall be apportioned on the basis of relative net investment in the following investment categories:

(1) interface arrangements;

(2) voice grade transmission facilities; and

(3) conditioning arrangements.

(b) Appropriate subelements shall be established for the use of interface arrangements. Charges for such subelements shall be assessed and computed as follows:

(1) Such charges shall be assessed upon all interexchange carriers for the interface arrangements they use to provide interstate or foreign services;

(2) Charges for all such subelements shall be designed to produce total annual revenues that are equal to the portion of the projected annual revenue requirement for Dedicated Transport that has been apportioned to the interface arrangements subelements; and

(3) Charges for individual subelements shall be designed to reflect cost differences among such subelements in a manner that complies with applicable Commission rules or decisions.

(c) A charge for the use of voice grade transmission facilities shall be assessed upon interexchange carriers that use such facilities to provide interstate or foreign services. Such charges shall be expressed in dollars and cents per unit of capacity. Total units of capacity provided to an interexchange carrier shall be measured by ascertaining the number of conversations that could be transmitted simultaneously without producing blocking in the dedicated transport facilities. The capacity unit charge for carriers that offer MTS shall be weighted by a distance factor that reflects the airline distance between the entry switch and the interexchange facility. The capacity unit charge for other carriers shall be weighted by a distance factor that reflects the lesser or least of the airline distance between the entry switch and such carrier's interexchange facility or the airline distance between the entry switch and any interexchange facility of carriers that offer MTS that is located within 5 miles of such carrier's interexchange facility.

(d) Appropriate subelements shall be established for the use of conditioning arrangements. Charges for such subelements shall be assessed and computed as follows:

(1) Such charges shall be assessed upon all interexchange carriers that use conditioning arrangements in their provision of interstate or foreign services;

(2) Charges for all such subelements shall be designed to produce total annual revenues that are equal to the portion of the projected annual revenue requirement for Dedicated Transport that has been apportioned to the conditioning arrangements subelements; and

(3) Charges for individual subelements shall be designed to reflect cost differences among such subelements in a manner that complies with applicable Commission rules or decisions.

69.113. Special Access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment.

(b) Charges for all subelements shall be designed to produce total annual revenue that is equal to the projected annual revenue requirement for the Special Access element.

(c) Charges for an individual subelement shall be assessed upon all interexchange carriers or enhanced service providers that use the equipment or facilities that are included within such subelement.

(d) Charges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions.

69.114. Billing and Collection.

(a) Billing and collection service shall be offered to all interexchange carriers if such a service is offered to any interexchange carrier. Charges shall be assessed upon all interexchange carriers that elect to use such services.

(b) Any difference in charges for such service or for a billing information service shall reasonably approximate cost differences in the service provided.

Subpart C: Computation of

Transition Charges

69.201. General.

Notwithstanding sections 69.4, 69.104 and 69.105, charges for the access elements described in this subpart shall be computed in the manner described in this subpart for the period commencing January 1, 1984 and ending December 31, 1990.

69.202. End User Common Line charges.

(a) Common line charges shall consist of a minimum charge that is expressed in dollars and cents per line per month, a maximum charge that is expressed in dollars and cents per line per month, and a usage charge that is expressed in dollars and cents per conversation minute or dollars and cents per call. Except as provided for in Section 69.206, all End User Common Line charges shall be assessed upon end users.

(b) The transitional End User Common Line charges shall be computed as provided in Sections 69.203–69.205.

69.203. Minimum charges.

(a) A minimum charge shall be assessed upon each local exchange service subscriber that does not pay the maximum charge. A minimum charge may be established at any level that does not exceed the charge that would have been computed pursuant to section 69.104(d) for the year in question, provided that the minimum charge for a single line residential or party line subscriber shall not be less than $2 and the minimum charge for a single-line business local exchange service customer shall be not be less than $4 or more than 200% of the residential minimum charge.

(b) The minimum for a multi-line local exchange service subscriber shall be computed by multiplying the applicable single line rate by the number of local exchange subscriber lines such subscriber uses.

(c) For purposes of this section, a line shall be deemed to be a residential line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff. All other lines shall be deemed to be business lines.

69.204. Usage charges.

(a) A usage charge shall be assessed for each originating conversation minute or originating call except originating minutes or calls for a collect MTS call, an In-WATS call or an open end FX, CCSA or CCSA equivalent call until the combined minimum and usage charges equal or exceed the maximum charge in a particular month. Third party billing calls shall be assessed to the line billed. Usage charges for a multiline local exchange service subscriber shall be attributed equally to each line for purposes of determining whether such a subscriber shall pay the maximum charge for any line in any month.

(b) The usage charge shall be computed by subtracting projected annual revenues from maximum and minimum charges and the surcharges described in Section 69.206 from the projected End User Common Line annual revenue requirement. That residual revenue requirement shall either be divided by the projected annual conversation minutes of end users that do not pay the maximum charge to compute a per minute charge or divided by the projected annual number of calls by such end users to compute a per call charge.

69.205. Maximum charges.

(a) A maximum charge may be established at any level that is not less than the charge that would have been computed pursuant to section 69.104(d) for the year in question, provided that the maximum shall not be more than the charges described in paragraph (b) of this section unless a charge described in paragraph (b) of this section is less than the applicable section 69.104(d) charge.

(b) The maximum for each transition year shall be as follows:

(1) 1984- the Dedicated Access Line per line rate;

(2) 1985- 90% of the 1985 Dedicated Access Line per line rate;

(3) 1986- 80% of the 1986 Dedicated Access Line per line rate;

(4) 1987- 60% of the 1987 Dedicated Access Line per line rate; and

(5) 1988–1990 - 50% of the 1988 Dedicated Access Line per line rate.

69.206. Transitional surcharges.

(a) During the period that a usage charge is assessed upon end users, a surcharge shall be assessed upon interexchange carriers that offer MTS, In-WATS, FX, CCSA or CCSA equivalent service as a surrogate for usage charges upon an end user that

originates a collect MTS call or originates an In-WATS call or an FX, CCSA or CCSA equivalent call that originates at the open end.

(b) If usage charges are assessed upon a per minute basis, the transitional surcharge shall be computed by multiplying the conversation minutes of such originating calls transmitted to a particular interexchange carrier by a per minute charge that is computed by multiplying the end user per minute usage charge by a factor that is equal to projected annual non-collect MTS conversation minutes of end users that do not pay maximum charges divided by total projected annual non-collect MTS conversation minutes.

(c) If usage charges are assessed upon a per call basis, the transitional surcharge shall be computed by multiplying such originating calls transmitted to a particular interexchange carrier by a per call charge that is computed by multiplying the end user per call usage charge by a factor that is equal to projected annual non-collect MTS calls of end users that do not pay maximum charges divided by total projected annual non-collect MTS calls.

69.207. Premium Access.

(a) Until the Commission determines that equivalent access arrangements are being offered to all interexchange carriers in all or almost all exchanges a portion of the Carrier Common Line revenue requirement shall be designated by Commission order as premium access. Such premium access shall be assessed to the carriers that offer MTS and WATS and shall be billed in equal monthly installments.

(b) In the absence of a Commission order designating the premium access portion, the premium access portion shall be equal to a projected annual revenue requirement for CPE other than Category 2 CPE or any surrogate for CPE costs that may be assigned to interstate and foreign services, but in no event shall premium access exceed the total annual Carrier Common Line revenue requirement.

69.208. Transitional Carrier Common Line.

Premium access revenues shall be deducted from the projected Carrier Common Line annual revenue requirement to determine the Transitional Carrier Common Line annual revenue requirement. Charges for the Transitional Carrier Common Line element shall be assessed and computed in the same manner as the post-transition Carrier Common Line element.

Subpart D: Apportionment of Net Investment

69.301. General.

(a) For purposes of computing annual revenue requirements for access elements net investment shall be apportioned among the interexchange category and access elements as provided in this subpart and expenses shall be apportioned as provided in Subpart E of this Part.

(b) The End User Common Line and Carrier Common Line elements shall be combined for purposes of this subpart and Subpart E of this Part. Those elements shall be described collectively as the Common Line element. The Common Line element revenue requirement shall be segregated in accordance with Subpart F of this Part.

69.302. Net investment.

(a) Investment in Accounts 100.1 and 122 shall be apportioned among the interexchange category and appropriate access elements as provided in Sections 69.303-69.309.

(b) Investment in Accounts 100.2-100.4 shall be apportioned in the following manner:

(1) COE investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 COE investment;

(2) OSP investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 OSP investment;

(3) Buildings investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 Buildings investment; and

(4) Investment that is not COE, OSP or Buildings investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 investment that is not COE, OSP or Buildings investment.

69.303. Station equipment.

(a) Investment in station equipment that is included in Separations Category 2 shall be assigned to the Special Access element.

(b) Investment in pay telephones and appurtenances shall be assigned to the Pay Telephone element.

(c) Investment in all other station equipment shall be apportioned between the Dedicated Access Line and Common Line elements on the basis of the relative number of equivalent lines in use. Each interstate or foreign dedicated access line shall be counted as one Dedicated Access Line. Local exchange subscriber lines shall be multiplied by the applicable interstate separations factor to determine the number of equivalent local exchange subscriber lines attributable to the Common Line element.

(d) Any investment that is apportioned to interstate and foreign services as a surrogate for customer premises equipment shall be apportioned between the Dedicated Access Line and Common Line elements in the same manner as investment apportioned pursuant to paragraph (c) of this section.

69.304. Customer OSP.

(a) Interstate and foreign private lines that are described as dedicated access lines in this Part shall be assigned to the Dedicated Access Line element. All other private lines shall be assigned to the Special Access element.

(b) Interstate WATS access lines shall be assigned to the Dedicated Access Line element. In the event that a portion of investment in interstate WATS access lines is allocated to intrastate services and a portion of intrastate WATS access lines is allocated to interstate services, the total unseparated investment in interstate WATS access lines that are described as dedicated access lines shall be assigned to the Dedicated Access Line element and investment apportioned to the Common Line element shall be adjusted to reflect the difference between unseparated interstate WATS access line investment and the WATS access line investment apportioned to interstate services pursuant to the *Separations Manual*.

(c) Investment in pay telephone lines shall be assigned to the Pay Telephone element.

(d) Investment in local exchange subscriber lines shall be assigned to the Common Line element.

(e) Investment in voice grade lines that are not in use shall be apportioned among the Dedicated Access Line, Pay Telephone, Common Line and Special Access elements on the basis of the relative number of equivalent voices grade lines in use. Each

interstate or foreign dedicated access line shall be counted as one line. Pay telephone lines and local exchange subscriber lines shall be multiplied by the applicable interstate separations factor to determine the number of equivalent pay telephone or local exchange subscriber lines.

(f) Investment in unused lines that are not voice grade shall be assigned to the Special Access element.

69.305. Carrier OSP.

(a) Carrier OSP that is not used for "origination" or "termination" as defined in sections 69.2 (v) and 69.2 (w) shall be assigned to the interexchange category.

(b) Carrier OSP other than WATS access lines not assigned pursuant to paragraph (a) of this section that is used for interexchange services that use switching facilities that are also used for local exchange telephone service shall be apportioned between the Dedicated Transport and Common Transport elements. Such OSP shall be assigned to the Dedicated Transport element if it is used exclusively for the interexchange services of a particular carrier.

(c) All Carrier OSP that is not apportioned pursuant to paragraphs (a) and (b) of this section shall be assigned to the Special Access element.

69.306. Central office equipment.

(a) The *Separations Manual* categories shall be used for purposes of apportioning investment in such equipment except that any Central Office Equipment attributable to a Dedicated Transport subelement shall be assigned to the Dedicated Transport element.

(b) Category 1 COE (Manual Switchboards) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance access elements. COE 1 of a telephone company that is not required to transfer assets pursuant to the Modified Final Judgment in *United States v. Western Electric Co.*shall be assigned to the interexchange category if such equipment would have been transferred to an interexchange carrier pursuant to that Modified Final Judgment. COE 1 that is used for intercept services shall be assigned to the Intercept element. COE 1 that is used for directory assistance service shall be assigned to the Information element. COE 1 that is not assigned to the interexchange category or the Intercept and Information elements shall be assigned to the Operator Assistance element.

(c) Category 2 COE (Tandem Switches) shall be assigned to the Common Transport element.

(d) Category 3 COE (Intertoll Dial Switching Equipment) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *Unites States v. Western Electric Co.*shall be assigned to the Common Transport element. All other COE 3 shall be assigned to the interexchange category.

(e) Category 4 COE (Automatic Message Recording Equipment) shall be assigned to the Billing and Collection element.

(f) Category 5 COE (Other Toll Dial Switching Equipment) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *United States v. Western Electric Co.shall be assigned to the Operator Assistance element. All other COE 5 shall be assigned to the interexchange category.*

(g) Category 6 COE (Local Dial Switching) that is classified as non-traffic sensitive for purposes of jurisdictional separations shall be assigned to the Line Termination element except as provided in paragraph (a) of this section. COE 6 that is classified as traffic sensitive for jurisdictional separations purposes shall be assigned to the Local

Switching element. In the event that any COE 6 is not used for local dial switching, such equipment shall be deemed to be Category 7 equipment for purposes of this Part.

(h) Category 7 COE (Special Services Switching) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *United States v. Western Electric Co.*shall be assigned to the Special Access element. All other COE 7 shall be assigned to the interexchange category.

(i) Category 8 COE (Circuit Equipment) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. COE 8 shall be apportioned in the same proportions as the associated OSP except as provided in paragraph (a) of this Section.

69.307. Buildings.

(a) The *Separations Manual* space categories and subcategories shall be used for purposes of apportioning Buildings investment.

(b) Category 1A space investment (Manual Switchboard) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance elements. Such investment shall be apportioned in the same proportions as COE 1 investment.

(c) Category 1B space investment (Circuit Equipment) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as COE 8 investment.

(d) Category 1C space investment (Dial Switching) shall be apportioned among the interexchange category and the Line Termination, Local Switching, Operator Assistance, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as combined investment in COE categories 2, 3, 5, 6 and 7.

(e) Category 2 space investment (Operator Quarters) and Category 3 space investment (General Traffic Supervision) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance elements. Such investment shall be apportioned in the same proportions as COE 1 investment.

(f) Category 4 space investment (Commercial Office) shall be apportioned among the interexchange category and the Pay Telephone, Information and Billing and Collection elements. Such investment shall be apportioned in the same proportions as combined commercial expenses.

(g) Category 5 space investment (Used Interstate by Another Company) and Category 11 space investment (Constructed for Another Company for interstate use) shall be assigned to the interexchange category.

(h) Category 6 space investment (Revenue Accounting) shall be apportioned among the interexchange category and all access elements in the same proportions as combined revenue accounting expenses.

(i) Category 7 space investment (Garages and Storerooms) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special access elements. Such investment shall be apportioned in the same manner as combined OSP investment.

(j) Category 8 space investment (Rented to others) shall be assigned to the interexchange category.

(k) Category 9 space investment (General Office) shall be apportioned among the interexchange category and all access elements in the same proportions as combined General Office expenses.

(l) Category 10 space investment (Antenna Support) shall be apportioned among the interexchange category and the appropriate access elements in the same manner as the antenna supported.

69.308. Land.

(a) Investment in land other than storage space that is occupied by a building or buildings or a building or buildings under construction shall be apportioned among the interexchange category and the appropriate access elements in the same manner as the buildings on such land.

(b) Investment in parcels of land other than storage space that are contiguous with a parcel described in paragraph (a) of this section shall be apportioned in the same proportions as investment in such contiguous parcel.

(c) Investment in storage space shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as combined OSP investment.

(d) Investment in land that is not apportioned pursuant to paragraphs (a), (b) and (c) of this section shall be apportioned among the interexchange category and all access elements in the same proportions as the combined land investment that is apportioned pursuant to paragraphs (a), (b) and (c) of this section.

69.309. Other investment.

Investment that is not apportioned pursuant to Sections 69.303–69.308 shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment that is apportioned pursuant to Sections 69.303–69.308.

Subpart E: Apportionment of Expenses

69.401. Direct expenses.

(a) Direct expense shall be assigned to the appropriate investment category and shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

(b) Amortization of embedded inside wiring investment and installation of new inside wiring and any maintenance or depreciation expense that is apportioned to interstate and foreign services as a surrogate for CPE maintenance or depreciation shall be deemed to be associated with section 69.303(c) other station equipment investment for purposes of the apportionment described in paragraph (a) of this section.

69.402. Current taxes.

(a) State income taxes and state gross receipts or gross earnings taxes that are collected in lieu of a corporate income tax shall be apportioned among the interexchange category and all access elements in the same proportions as the combined Station Equipment, OSP, COE, Buildings and Land investment attributable to property that is located within the state that imposed the tax.

(b) Social Security taxes shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

(c) All other current taxes including federal income taxes shall be apportioned

among the interexchange category and all access elements in the same manner as Section 69.309 Other Investment.

69.403. Deferred tax expenses.

(a) Account 304 investment tax credits shall be assigned to the investment category that produced the tax credit. Credits from amortization of past investment tax credits shall be deducted from the balance for the relevant investment category. The net balance shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

(b) Other deferred tax expenses, including Account 308.1 and 308.2 expenses and comparable expenses in Account 307, shall be assigned to the investment category that produced the hypothetical tax. Such expense shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

69.404. Traffic expenses.

Traffic expenses shall be apportioned among the interexchange category and the Intercept, Information and Operation Assistance elements in the same proportions as COE 1 investment.

69.405. Commercial expenses.

(a) Sales, Advertising and Connecting Company Relations expenses (Accounts 642, 643 and 644) shall be assigned to the interexchange category.

(b) Local Commercial expenses (Account 645) shall be assigned to the Billing and Collection element.

(c) Public Telephone Commissions expense (Account 648) shall be assigned to the Pay Telephone element.

(d) Directory expenses (Account 649) shall be assigned to the Information element.

(e) All other Commercial Expenses shall be apportioned among the interexchange category and the Pay Telephone, Information and Billing and Collection elements in the same proportions as the combined expense apportioned pursuant to paragraphs (a)-(d) of this section.

69.406. Revenue Accounting expenses.

(a) Revenue Accounting Expenses that are attributable to End User access billings shall be apportioned among the Dedicated Access Line, Pay Telephone and Common Line elements. Such expense shall be apportioned on the basis of relative investment other than revenue accounting space investment apportioned to each such element.

(b) Revenue Accounting Expenses that are attributable to carrier's carrier access billings shall be apportioned among all carrier's carrier access elements except the Common Line element. Such expenses shall be apportioned on the basis of relative investment other than revenue accounting space investment apportioned to each such element.

(c) All other Revenue Accounting Expenses shall be assigned to the Billing and Collection element.

69.407. General Office expenses.

(a) The portion of Account 665 expense that is attributable to engineering expenses shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment in Station Equipment, OSP and COE.

(b) All other General Office Expenses shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

69.408. Relief and Pensions.

Relief and pensions expense shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

69.409. License Contract expenses.

License contract expenses shall be assigned to expense categories in the same manner as expenses that are incurred directly by the telephone company and shall be apportioned in the same manner as such directly incurred expenses.

69.410. Other expenses.

Expenses that are not apportioned pursuant to Sections 69.401 - 69.409 shall be apportioned among the interexchange category and all access elements in the same manner as Section 69.309 Other Investment.

Subpart F: Segregation of Common Line Element Revenue Requirement

69.501. General.

(a) Any portion of the Common Line element annual revenue requirement that is attributable to the application of a jurisdictional separations factor that is described as a High Cost Factor or a Universal Service Factor shall be assigned to the Carrier Common Line element or elements.

(b) Any portion of the Common Line element annual revenue requirement that is attributable to CPE investment or expense or surrogate CPE investment or expense shall be assigned to the Carrier Common Line element or elements.

(c) Any portion of the Common Line element annual revenue requirement that is attributable to inside wiring investment or expense shall be assigned to the Carrier Common Line element or elements.

(d) Any portion of the Common Line element revenue requirement that is not assigned to Carrier Common Line elements pursuant to paragraphs (a), (b) and (c) of this section shall be apportioned between End User Common Line and Carrier Common Line pursuant to Sections 69.502 and 69.503. Such portion of the Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this Subpart.

69.502. Base factor apportionment.

(a) The base factor portion shall be divided by the projected average number of subscriber local exchange lines in use during the relevant year in order to determine a base factor per line annual revenue requirement.

(b) If the base factor per line annual revenue requirement is $48 or less per year the base factor portion shall be assigned to the End User Common Line element.

(c) If the base factor per line revenue requirement is more than $48 per year -

(1) an amount that equals $48 multiplied by the projected average number of local exchange subscriber lines in use during the relevant year shall be assigned to the End User Common Line element; and

(2) the remainder of the base factor portion or transitional portion shall be apportioned in accordance with Section 69.503.

69.503. Apportionment of transitional portion.

(a) The transitional portion shall be assigned to the Carrier Common Line elements in 1984 access charges.

(b) In 1985 access charges 80% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(c) In 1986 access charges 60% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(d) In 1987 access charges 40% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(e) In 1988 access charges 20% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(g) The transitional portion shall be assigned to the End User Common Line element in access charges for 1989 and subsequent years.

Subpart G: Exchange Carrier Association

69.601. Exchange carrier association.

(a) An association shall be established in order to prepare and file access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements.

(b) All telephone companies that participate in the distribution of Carrier Common Line revenues collected by the association shall be deemed to be members of such association.

69.602. Board of directors.

[reserved]

69.603. Association functions.

(a) The association shall not engage in any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues unless such additional activity is expressly authorized by order of the Commission.

(b) Participation in Commission or court proceedings relating to access charge tariffs, the billing and collection of access charges, or the distribution of access charge revenues shall be deemed to be authorized association activities.

69.604. Billing and collection of access charges.

(a) The association shall bill and collect all Carrier Common Line access charges including any premium access assessment.

(b) Telephone companies shall bill and collect all other End User or Carrier's Carrier access charges.

(c) All access charges shall be billed monthly.

69.605. Distribution of Carrier Common Line revenues.

(a) Carrier Common Line revenues received by the association shall be distributed monthly in accordance with this Subpart.

(b) Association expenses incurred during the month that are allowable access charge expenses shall be reimbursed before any other funds are disbursed.

(c) Except as provided in paragraph (b) of this section, payments to average schedule companies that are computed in accordance with Section 69.606 shall be disbursed before any other funds are disbursed. For purposes of this Part, a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company except that:

(1) Any company that directly or indirectly controls, is directly or indirectly controlled by, is under direct or indirect control with, or merges with a telephone company that did not participate in average schedule settlements on December 1, 1982, shall not be deemed to be an average schedule company; and

(2) Any company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company.

(d) The residue shall be disbursed to telephone companies that are not average schedule companies in accordance with Sections 69.607–69.610.

69.606. Computation of average schedule company payments.

(a) Payments shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to Section 69.607 by a company that is representative of average schedule companies.

(b) AT&T shall submit a proposed 1984 formula to the Commission on or before June 30, 1983. The association shall submit a proposed revision of the formula for each year after 1984 or certify that a majority of the directors of the association believe that no revisions are warranted for such year on or before June 30 of the preceding year.

69.607. Disbursement of Carrier Common Line residue.

(a) The association shall compute a monthly net balance for each member telephone company that is not an average schedule company. If such a company has a negative net balance, the association shall bill that amount to such company. If such a company has a positive net balance, the association shall disburse that amount to such company.

(b) The net balance for such a company shall be computed by multiplying a hypothetical net balance for such a company by a factor that is computed by dividing the Carrier Common Line residue by the sum of the hypothetical net balances for such companies.

(c) The hypothetical net balance for each company shall be the sum of the hypothetical net balances for each access element except the Billing and Collection element. All Carrier Common Line elements shall be deemed to be one element and all End User Common Line elements including transitional surcharges assessed to interexchange carriers shall be deemed to be one element for purposes of computing such hypothetical net balances. Such hypothetical net balances shall be computed in accordance with Sections 69.608–69.610.

69.608. Carrier Common Line hypothetical net balance.

The hypothetical net balance shall be equal to a Carrier Common Line revenue requirement for each such company that is computed in accordance with Subpart F of this Part.

69.609. End User Common Line hypothetical net balances.

(a) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(b) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by multiplying an amount that is computed by deducting access revenues collected by such company for such element from an End User Common Line revenue requirement for such company that is computed in accordance with Subpart F of this Part by a factor that is computed by dividing access revenues collected by all such companies for such element by an End User Common Line revenue requirement for all such companies that is computed in accordance with Subpart F of this Part.

69.610. Other hypothetical net balances.

(a) The hypothetical net balance for an access element other than Billing and Collection or a Common Line element shall be computed as provided in this section.

(b) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(c) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by deducting access revenues collected for such element from the sum of expense attributable to such element and the element residue apportioned to such company. The element residue shall be apportioned among such companies in the same proportions as the net investment attributable to such element.

(d) The element residue shall be computed by deducting expenses of all participating companies attributable to such element from revenues collected by all participating companies for such element.

Statement of
FCC Commissioner James H. Quello

In Re: Report and Order in CC Docket No. 78–72, Phase 1, In the Matter of MTS and WATS Market Structure

To state that this was a difficult decision would be to carry the use of understatement to its extreme. The decision was difficult because of its complexity, to be sure, but it was made even more difficult because it is so far-reaching. It's difficult to imagine that any American will be untouched by the action the Commission has taken today.

It would have been easy to resist taking any action at this time, merely postponing action until it was forced upon us. But delay would not serve the public, the telecommunications industry nor would it serve the Commission itself. The die was cast long ago and we are rapidly moving into a new era of telecommunications in this country and throughout the world. Moving toward competition and away from monopoly requires that the industry move toward cost-based pricing. Equal access to the network has been mandated by both this Commission and by the Court in its approval of the Modified Final Judgment. It is also mandated by competition and by technology. We cannot turn back the clock.

This decision was bounded by two very strong considerations. The first is the abiding concern of this Commission and the Congress that the concept of universal service not be sacrificed. In my mind, this is the overriding concern as we attempt to fashion a new rate structure. It bears very heavily upon our second constraint; i.e., the threat that the local exchange will be bypassed by large users. Bypass, while not widely understood and appreciated, provides perhaps a greater threat to universal service

than do increased local rates of a magnitude far above those implied by our action today. For example, AT&T has claimed that 5 percent of its customers generate 63 percent of its revenues. By ignoring the threat of bypass, we could only encourage more and more of those large users to leave the local exchanges across the country leaving those exchanges with most of their present costs but without present revenues. Bypass is a phenomenon which feeds upon itself. As more large users leave the exchange, those which remain must bear a larger share of the costs, encouraging more bypass and even higher costs. Clearly, we do not want to encourage such a scenario.

The Report and Order, in my view, is a measured, carefully considered step along a path which will lead to an even better telecommunications service in the future without destroying what we must rely upon in the present. Is it a perfect approach to this very complex problem?

In the words of Voltaire:

Perfection is attained by slow degrees; it requires the hand of time.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase I

The adoption by the Federal Communications Commission of this Access Charge Order is of historic importance. This decision marks the culmination of a long and tortuous inquiry into a proper access charge structure.[1] Because this Order prescribes the manner of compensation that all exchange carriers will receive for the origination and termination of all interstate and international telecommunications or enhanced service, every ratepayer in this country will be affected. In the first year alone, the access charge plan will require the restructuring of rates for 11 to 13 billion dollars in non-traffic sensitive (NTS) and traffic sensitive (TS) plant.

Given the magnitude of our decision, I believe that I am correct in asserting that the *MTS and WATS Market Structure* rulemaking is one of the most important proceedings which has come before the Commission during my tenure, if not during the entire history of the Commission. The issues before the Commission in Phase I were not only technically complex, but also raised several important and competing policy considerations. In adopting this access charge plan, the Commission has succeeded admirably in balancing these competing values. The Commission has resisted the Siren-song lure of theoretical purity, recognizing the reality of the need for reasonable rates and maintenance of universal service. In the process, we have

[1] *See MTS and WATS Market Structure*, CC Docket No. 78–72, Notice of Inquiry and Proposed Rulemaking, 67 FCC 2d 757 (1978); Supplemental Notice of Inquiry and Proposed Rulemaking, 73 FCC 2d 222 (1979), Second Supplemental Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 224 (1980); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); and Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135 (1982).

developed a plan which advances the overall public interest and is the best solution that could be fashioned under the circumstances. I wholeheartedly support this decision.

Section 1 of the Communications Act mandates that this Commission regulate "so as to make available, so far as possible, to all the people of the United States a rapid, efficient. . . communications service with adequate facilities at reasonable charges." In my judgment, the most critical factor in this proceeding has been the need to structure an access charge plan which would protect this principle and value of universal service. While local exchange service is not so elastic as toll service, it certainly is not inelastic.[2] In the monopoly environment of the past, the FCC and the State commissions made deliberate compromises in favor of the immediate, pragmatic objective of universal service at the expense of more theoretical objectives, such as economic efficiency. The dilemma created by technological progress and competition is that such compromises have become increasingly difficult to forge, implement, and maintain. No longer are regulators free to increase the load of NTS costs on long distance users in order to keep local residential rates low. Technological advance now affords major toll users the option of bypassing the public network altogether to avoid uneconomic charges. This phenomenon of bypass, with its negative revenue consequences, must still be weighed, however, against the harm that the direct assignment of all NTS costs to end users might cause. Even though bypass would be discouraged, such a strategy of total direct assignment could result in an unacceptable loss in the subscriber base as rural users, the poor and the elderly would be put to a hard choice between essentials.

The access charge structure adopted by the Commission meets this concern by striking an appropriate balance between the need to encourage efficiency and the need to preserve universal service. Under this structure, uneconomic bypass should be discouraged while at the same time there should be no substantial service dislocations. Universal service in rural, high cost areas will be protected by the universal service factor element of the carrier common line charge. Similarly, service discontinuance by those too poor to absorb large rate increases will be discouraged by the implementation of a reasonable maximum end user charge based upon the anticipated Joint Board recommendation in Docket 80–286.[3]

In achieving this balance, the access charge plan affords both

[2] *See generally*, Appendix G.

[3] The alternative of a government-sponsored "phone stamps" program is not viable. Among the many problems with such a plan are the fact that the program would be difficult to target and the fact that it would call for increased government expenditures at a time when such expenditures are not feasible.

protection to ratepayers and flexibility to telephone companies. The transition period is structured so that the increase in the end user charge to its maximum cost will be gradual, starting with a $4 per month average revenue requirement. Heavy toll users will be protected by a cap on the amount that they may be charged for NTS costs. Telephone companies will be afforded the flexibility to determine how customer charges will be collected during the transition through a combination of usage and flat charges. As a consequence, those low-cost companies facing significant bypass problems and little threat of subscriber loss may move quickly to their full end user charge, while those companies with less significant bypass problems may move more slowly. In addition, the Exchange Carriers Association will allow companies the option to pool their costs in a manner somewhat reminiscent of current practice. This is crucial because for many small carriers developing and administering access charges would present an impossible burden.

Flexibility is also granted to the States as this decision permits them to recover intrastate NTS costs in any fashion they desire. This is important because the amount of NTS plant in the intrastate jurisdiction dwarfs the amount of interstate NTS plant. Further, the circumstances differ between the States, and it may be impossible to develop uniform Federal rules for the access charge treatment of intrastate NTS costs.[4] Leaving this discretion with the States will promote the regulatory flexibility and experimentation which has proved so beneficial in the past.

Of even more importance is the fact that there will be a monitoring system, in place by January 1, 1984, designed to ensure that any unforeseen developments that threaten universal service are discovered in time for corrective action to be taken. This built-in flexibility is critical because of the uncertainties involved. In addition, the requirements of periodic staff reports to the Commission and further Commission action before continuing the plan beyond the fifth year will ensure the fulfilment of our statutory mandate.

In addition to striking a realistic balance between the new imperative of economic efficiency and the continuing mandate of universal service, this decision takes the long overdue step of ending what has been an intolerable discrimination between MTS/WATS and ENFIA. Under the rules we have adopted, the OCCs will finally pay the full cost of interconnection—even during the transition. There will be no more discounts. Further, open-end Private Line and FX will also contribute fully for the first time to the recovery of

[4] We face a very different situation here on access charges than that which we recently confronted on depreciation policy. *See Amendment of of Part 31*, on reconsideration, — FCC 2d — (1985).

common costs. This is only fair. For too long MTS and WATS ratepayers have been picking up costs which should have been borne by ENFIA and open-end Private Line and FX users.[5] Although during transition AT&T will pay a premium access charge theoretically based on its superior interconnection, the differential will be smaller than the current ENFIA discount and will end at approximately the same time as the OCCs are afforded equal access under the divestiture decree.[6]

In conclusion, I believe that the Commission has succeeded in developing the best possible access charge plan—a plan which carefully balances competing policy values and recognizes a continuing need for surveillance and possible adjustment in the public interest.

SEPARATE STATEMENT OF COMMISSIONER ANNE P. JONES CONCURRING AND DISSENTING IN PART

In Re: MTS and WATS Market Structure, CC Docket 78–72, Phase I

The FCC's decision in this proceeding is undoubtedly the most significant one that the agency will make during my tenure as a Commissioner. I believe it is vitally important that the FCC's access charge plan (ACP) be clear, practical and carefully crafted to support the pro-competitive policies this agency has adopted for the telecommunications industry. From a public policy perspective, competition in the telecommunications industry is simply a means to an end, namely, a form of economic discipline that encourages telecommunications suppliers to provide consumers a broad choice of products and services at the least possible cost. The Commission's encouragement of telecommunications competition is intended, therefore, to improve the welfare of consumers of telecommunications products and services. While I believe that the basic thrust of the Commission's access charge plan is a step in the right direction, I fear that the specific plan adopted is improperly focused, needlessly complex, and not fully committed to the goal of promoting vigorous competition in the telecommunications industry. As I explain herein, I would prefer a simpler, more comprehensive approach that would encourage the rapid development of telecommunications competition and the early realization of its benefits for consumers.

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[5] *See* Dissenting Statement of Commissioner Joseph R. Fogarty, *Extension of ENFIA Agreement*, 90 FCC 2d 6, 20–21 (1982).

[6] *See* Modified Final Judgment, *United States v. Western Electric Co.*, Civil Action No. 82–0192 (D.D.C., entered August 24, 1982).

This proceeding was initiated as a market structure inquiry. Following the court's directions in *Execunet I*,[1] the Commission set out to determine whether MTS and WATS services should be offered on a sole source or competitive basis. *Notice of Inquiry and Proposed Rulemaking*, 67 FCC 2d 757 (1978). As part of that inquiry, the Commission specified that it would reexamine the separations process. *Id.* at 759. Finding it "necessary to formulate policy in this area," the Commission proposed to determine what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causational basis; what additional charges, if any, should be levied on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services.

Id.

Following the ENFIA negotiations,[2] the Commission seemed to lose sight of this resolve. Instead of addressing the broader concern of reforming the separations process and moving toward cost causational pricing of network access, the Commission narrowed its focus merely to adjusting prices so that it could eliminate discriminations in current access arrangements for MTS, WATS, and certain private line services and in the interstate rates for these services. Thus, rather than beginning its analysis of access charges from the perspective of establishing economically-efficient network access prices, the Commission framed the issue as a "discrimination problem" when it proposed an access charge plan in the *Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224 (1980). This orientation is still evident in the current access charge plan. (*See e.g.*, p. 30 description of various plans as "Alternative Strategies for Reducing Discrimination.") I now believe this change in perspective was unwise.

By reorienting the focus of the access charge issue as a rate discrimination problem, the Commission diverted its attention from causes to symptoms of anomalous pricing of both local exchange access and interstate switched network services. The fundamental problem is *not* that interstate MTS and WATS rates are discriminatory compared with interstate private line rates. Rather, the basic problem is that neither the current compensation mechanism for local exchange access for interstate telecommunications services nor rates for MTS and WATS are priced on a cost causational basis.[3] By neglecting the goal of cost causation in favor of treating the symptoms of non-cost-based rates, the Commission's access charge

[1] *MCI Telecommunications Corp. v. FCC*, 651 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

[2] See *Exchange Network Facilities*, 71 FCC 2d 440 (1979).

[3] *MTS and WATS Market Structure*, 67 FCC 2d 759 (1978).

plan has introduced new distortions in the pricing of private line services and, paradoxically, has created new rate discriminations in the pricing of local exchange access lines.

The shift in emphasis from close adherence to the principle of cost causation to "alternative strategies for reducing discrimination" is more than a semantic difference or a subtlety with no substantive impact. Encouraging non-discriminatory access to local exchange facilities at cost-based rates is essential to the realization of the Commission's goal of fostering a competitive MTS and WATS market. By assigning a higher priority to achieving "equitable access" to local exchange facilities than to encouraging efficient, cost-based pricing of the usage of local telephone plant, the Commission may have adopted an access charge plan that will discourage new entry into the MTS and WATS market, slow considerably the growth rate of the other common carriers (OCCs), and provide the basis for continuing dominance of AT&T in the MTS and WATS market.

The following discussion will outline the specific reasons why I feel that the access charge plan adopted by the Commission may severely frustrate the realization of the open entry policy for the MTS and WATS market adopted by the Commission in this proceeding. I also propose a more comprehensive alternative plan that is fully consistent with the goal of an open entry, competitive MTS and WATS market.

The Access Charge Plan and Its Impact on Economic Efficiency and Competition in the MTS and WATS Market

Much of my concern over the ACP centers on the treatment of non-traffic sensitive (NTS) costs during the transition period. The ACP correctly recognizes the need to shift the recovery of interstate NTS local exchange costs from interexchange carriers to local exchange end users as a flat charge rather than on a usage-sensitive basis.[4]

Given this recognition of where we need to go, I find it both unfortunate and ironic that usage-sensitive recovery of NTS costs remains such a major component of the Commission's transition plan. To a limited extent, usage-sensitive charges may be sensible expedients for the recovery of NTS costs that the Commission has ordered phased out, or may decide to phase out of the interstate jurisdiction, such as customer premises equipment (CPE) or inside

[4] This principle of cost causation is fundamental to *any* access charge plan, a point that I have emphasized in earlier phases of this docket. See "Statement of Commissioner Anne P. Jones in which Commissioners Mimi W. Dawson, Henry M. Rivera and Abbott Washburn Join *In Re*: MTS and WATS Market Structure, CC Jones," Session on *Separation Changes and the Joint Board in Light of the AT&T Divestiture*, Twenty-First Annual Iowa State Regulatory Conference, Ames, Iowa, May 20, 1982.

wiring. There is little point in building transitional costs into flat charges that will be reduced following the transition period. Rather, it is important that users clearly perceive the direction and magnitude of the significant change in the pricing and cost recovery policy that the Commission's ACP represents. Consequently, usage-sensitive recovery of CPE and inside wiring costs through a carrier's-carrier charge is a reasonable mechanism for recovering transitional costs. By adopting this transitional mechanism, the flat-rate recovery of NTS costs provides an accurate signal concerning the direction and magnitude of NTS cost recovery on a going-forward basis.

By contrast, the combination of an end-user flat fee and interstate usage fee ("mover") permitted by the ACP during the transition period appears discriminatory, needlessly complex, confusing, and highly accelerated in its first year revenue impact. The transition plan establishes different minimum end-user flat charges for residence and business customers (two and four dollars, respectively) with no empirical evidence that cost-justifies the differential.[5] It also requires that an exchange carrier that attempts to design an end-user usage charge for recovering the difference between the maximum and minimum interstate revenue requirement per line estimate, somehow, the price elasticity of demand for end-user access to an intercity carrier. It is not clear that the "pricing flexibility" provided by the transitional, usage-based mechanism for recovering NTS costs will provide a local exchange carrier much certainty concerning recovery of its interstate NTS revenue requirements, given the maximum charge and the unknown price elasticity of demand for interstate access. Thus, the risk of a revenue requirements short-fall appears substantial.

In addition, the combination of flat fee and mover charge introduces a billing complexity that many consumers may find difficult to understand. Also, large users that quickly reach the maximum monthly charge or "cap" may appear to receive a discriminatory "volume discount" unrelated to any economies of bulk usage. Low and moderate volume users will find their relative proportion of NTS costs sharply increased as compared with high-volume users. Since the ACP moves nearly one-half the interstate NTS revenue requirement onto end users in just the first year, local exchange carriers may have a reduced incentive to move steadily toward full flat rate recovery of end user NTS costs. In effect, the Commission has delegated to the local exchange carrier the responsibility for timing the implementation of its policy for assigning interstate NTS costs to end users.

The complexities and peculiar incentives induced by the "mover"

[5] Paragraph 177 alludes to the ". . . higher interstate revenue requirement generated by business lines as compared to residential lines" but does not indicate whether the prescribed differences in the transitional flat rate charges closely tracks actual differences in cost between these two user classifications.

and "cap" transitional cost recovery mechanism could be completely avoided by simply phasing in the end-user flat charge on a straightline basis over the transition period with no usage charges. In other words, the flat-rate end-user charge would simply increase in equal dollar increments per year until the end of the transition period where the flat rate would just equal the average interstate NTS revenue requirement per line. All end-user lines would be subject to the same flat rate with no discrimination in pricing between business and residential users. Over the transition period, all end-user NTS costs not recovered in the flat-rate line charge would be recovered by a carrier's-carrier charge. This approach narrowly circumscribes the use of a traffic-sensitive mechanism for recovering NTS costs and places both carriers and customers on a predictable path toward eventual full flat-rate recovery of end-user interstate NTS local exchange costs.

It is also unfortunate that the "Universal Service Fund" (USF) established by the ACP will be funded through a usage-sensitive carrier's-carrier charge. Unlike the end-user mover charge, a usage-sensitive mechanism is employed on a permanent rather than transitional basis to help recover the NTS costs in "high cost" exchanges. A more efficient alternative would be the imposition of a uniform surcharge or "tax" on every local exchange access line.[6] As Appendix G of the *Third Report and Order* suggests, the demand for access tends to be inelastic. A tax imposed on a good or service having an inelastic demand will minimize the loss in consumer welfare compared with a tax on a good or service with more elastic demand.[7]

Given the growing availability of alternative local distribution technologies, the demand for local exchange access by intercity carriers will probably become more elastic over time. Imposing such a surcharge will decrease the quantity demanded for access at the margin and impose a loss in economic welfare depending on the price elasticity of demand. This potential loss in economic efficiency induced by usage-sensitive recovery of NTS costs could be completely avoided through imposition of a line surcharge. Ironically, by funding the USF through a carrier's-carrier charge, interstate MTS and WATS rates must then recover the carrier's-carrier USF charge. Of course, this method is equivalent to present practice, except that the amount of subsidy embedded in MTS and WATS rates would be reduced given the phase-in of end-user line charges.

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[6] For example, if the annual subsidy necessary to fund the USF were $410,000,000 annually, then the estimated uniform surcharge per line per month would be 36!. See "Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure," Figure II.

[7] See Agnar Sandmo, "Optimal Taxation: An Introduction to the Literature," *Journal of Public Economics* 6 (1976): 37–54.

Apart from the economic inefficiency induced by funding the USF through usage-sensitive carrier's-carrier charges, I have serious reservations about the concept of the USF as developed in the ACP. While nominally intended to maintain "universal service," the USF is targeted toward the subsidy of "high cost" telephone companies, *not* consumers who might abandon telephone service at some higher but *unknown* level of telephone rates. Putting the matter plainly, the USF is first and foremost a mechanism for protecting telephone companies. This protectionist mechanism may produce "trickle down" benefits to local subscribers, although the potential subsidization of *all* users is a highly inefficient way to achieve a "universal service" goal.[8] Possibly the protection of "high cost" telephone companies is a worthy goal of public policy. If so, it should be addressed forthrightly and on its own merits and not treated as if it were equivalent to helping *targeted* consumers pay the costs of accessing the local telephone exchange.

Regulatory Cost Allocation. Essential to the design of nondiscriminatory rates for network access is avoiding the pitfalls of regulatory cost allocation.[9] By stressing equitable rather than cost-based access charges, the ACP ignores the history and lessons of the Commission's previous experience with regulatory cost allocation. This experience suggests that cost allocation procedures as prescribed by the Commission may result in rates filed by carriers that bear little relationship to the underlying economic costs of providing telecommunications services. As a result, regulatory cost allocation methodologies that result in "allocated costs" that depart from economic costs or regulatory cost allocation rules that grant dominant firms considerable discretion in implementing the regulatory costing methodology may encourage inefficient market entry or repel innovative competitors. In either case, regulatory cost allocation is both a controversial and a highly problematical regulatory tool for promoting competition in the telecommunications industry.

The ACP is a regulatory cost allocation methodology, not a pricing mechanism based on marginal cost or on general principles of efficient rate structure design. Since the ACP reflects little familiarity with the hazards of a regulatory costing methodology, I feel that some review of the Commission's experience with cost allocation in markets subject to competitive entry is essential to the further

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[8] For further discussion of this point, see Bridger M. Mitchell, "Pricing Subscriber Access to the Telephone Network," *The Rand Paper Series #P-6815*, October, 1982.

[9] The term "regulatory cost allocation" refers to various costing procedures or rules that a regulatory agency prescribes for computing the costs of individual services provided by a regulated carrier. Regulatory cost allocation is distinguished from the Uniform System of Accounts that determines the level of total revenue requirements of a carrier but not the disaggregated costs attributable to any given service.

discussion of my reservations with the ACP. This discussion also helps to explain why my alternative approach, which largely eschews regulatory cost allocation, offers important advantages.

Regulatory cost allocation apportions both the operating expenses and the return on net depreciated assets of a regulated carrier among various "service" categories. The perceived regulatory need for cost allocation in interstate telecommunications was a direct byproduct of the Commission's *Above 890* decision in 1959 which permitted users to build their own private microwave transmission facilities.[10] To discourage large private line customers from building their own facilities, AT&T introduced its TELPAK bulk rate private line tariff that offered substantial discounts to large users of private line circuits. For the next fifteen years, the Commission attempted to determine in multiple dockets whether such rate adjustments by AT&T were simply a lawful pricing response to competition or pricing behavior intended to eliminate competition. The development of regulatory cost allocation procedures emerged as a focal point of such deliberations.

The relative merits of "long run incremental cost" (LRIC) versus "fully distributed cost" (FDC) were hotly debated before the Commission during the 1970s. Finally, in 1976, the Commission decided in Docket 18128 that FDC "Method 7" based on the principle of "historical cost causation" would provide the basis for the development of lawful tariffs for AT&T's interstate services.[11] Despite the potential loss in economic efficiency that a FDC pricing standard may induce, the Commission believed that only a FDC standard would ensure that AT&T was "accountable" for its ratemaking practices.[12]

Apart from the controversy over FDC versus LRIC as the appropriate regulatory cost standard, another fundamental difficulty in any regulatory costing methodology is the troublesome concept of a "service." Once the carrier has defined its service offering, the Commission has required the carrier to "cost-justify" the rates for the defined service.[13] Granting the carrier broad discretion in defining services creates incentives for the carrier to

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[10] A review of the Commission's experience with regulatory cost allocation in various dockets is reviewed by Walter G. Bolter, "The FCC's Selection of a 'Proper' Costing Standard after Fifteen Years—What Can We Learn from Docket 18128?" in *Assessing New Pricing Concepts in Public Utilities*, ed. Harry M. Trebing (East Lansing, Michigan: Michigan State University, 1978), pp. 333–372.

[11] *Revision of Tariff FCC No. 260 Private Line Services*, 61 FCC 2d 587 (1976).

[12] A contemporary discussion of the carrier "accountability" standard is provided by William H. Melody, "Interservice Subsidy: Regulatory Standards and Applied Economics" in *Essays on Public Utility Pricing and Regulation*, ed. Harry M. Trebing (East Lansing, Michigan: Michigan State University, 1971), pp. 167–210.

[13] The Commission's requirements for cost justification are prescribed in Part 61.38 of the Commission's Rules.

implement regulatory cost allocation rules to achieve corporate objectives that may conflict with public interest goals, including that of encouraging competitive telecommunications markets. In other words, regulatory cost allocation can be used strategically by the regulated dominant firm to achieve corporate objectives and influence its market environment.[14] As Alfred Kahn has observed, " . . . what constitutes a separate product or service depends in a sense on what it pays the businessman to price or cost separately."[15]

By exercising its discretion in the definition of tariffed services, the regulated dominant firm can pursue some of the profit strategies of an unregulated monopolist. For example, an unregulated monopolist can implement a profit-enhancing price discrimination strategy by segmenting its market in accordance with perceived differences in the elasticity of demand and charging different profit-maximizing prices in each market.[16] Successful implementation of this pricing strategy, however, requires some mechanism to prevent resale and arbitrage between the high and low price market. A regulated dominant firm can implement a similar strategy by designing a tariff that "creates" separate services that, for all practical purposes, simply segments users in terms of differing elasticities of demand.[17] Tariff restrictions that prohibit resale or shared use can effectively segment the market to permit successful implementation of the price discrimination strategy.[18] Not all price discrimination schemes

[14] For further discussion of the incentives of a regulated dominant firm, see Jerry B. Duvall, "Emerging Rate Structures in Interstate Telecommunications," paper presented at the *Michigan State University Institute of Public Utilities Fourteenth Annual Conference* "Adjusting to Regulatory, Pricing, and Marketing Realities," Williamsburg, Virginia, December 14, 1982. A theoretical analysis of such incentives is developed in Gerald W. Brock, *The Telecommunications Industry: The Dynamics of Market Structure* (Cambridge, Massachusetts: Harvard University Press, 1981).

[15] Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1 (New York: John Wiley & Sons, Inc., 1970), p. 78.

[16] A clear discussion of this price discrimination strategy is provided by James M. Henderson and Richard E. Quandt, *Microeconomic Theory: A Mathematical Approach*, 3d ed. (New York: McGraw-Hill, 1980), pp. 181–184.

[17] Interstate MTS and WATS are possible examples of this market segmentation strategy. Large-volume users of switched message service are likely to have a more elastic demand for MTS than small-volume users, given the availability of both private and public alternative, high-volume transmission facilities. By constructing highly dissimilar rate structures for MTS and WATS, AT&T has been able to segment effectively the market for public switched network service to exploit the differences in the price elasticity of demand for small and large-volume users.

[18] To the extent rate of return regulation is binding, the regulated dominant firm is constrained from earning excess profits that an unregulated monopolist might obtain by implementing a market segmentation and price discrimination strategy. Of course, the regulated firm may still earn excess profits through a similar pricing strategy, although it may camouflage such earnings through "organizational slack" or operating inefficiencies. Perhaps more troublesome than the possibility that a regulated firm may evade regulation and earn excess

implemented by a regulated dominant firm are necessarily harmful to consumers. For example, price discrimination embedded in a volume-sensitive, nonlinear rate structure or a self-selecting, two-part tariff provides a mechanism for reconciling conflicting regulatory objectives such as wide subscribership to telephone service versus the pricing of usage to high-volume users at marginal cost.[19] Such rate structures, however, should be designed pursuant to regulatory rate structure guidelines to insure that the resulting price discrimination is welfare-enhancing rather than harmful to consumers and competitors. I propose this type of efficient price discrimination subject to federal regulatory guidelines as an aspect of my alternative access charge plan presented later in the statement.

In general, given the distorted pricing incentives that rate-base regulation may induce, including the entry of a regulated firm into competitive markets at rates below cost,[20] regulators should be especially sensitive to inefficient, discriminatory rate structures and to the definition of services proposed by regulated carriers. As Roger Sherman and Michael Visscher have observed,

> Price structures may not portray for consumers the full range of opportunities available. The consumer simply is not asked to make some choices, and by that fact alone the range of consumer choice is cut. This is so because the shape of the service can be seriously affected by the aspects of choice in which it is expressed and offered to consumers. Any failure of regulation to deal with the question of price structure is important, then, not simply because prices may be set at levels that are not optimal but also because the elements of products or services that are priced may not be the best ones. *So products and services can be defined inadequately for ideal pricing, before the pricing task itself is even undertaken.*[21]

To the extent a regulated carrier defines a service in order to segment the market and implement a price discrimination scheme,

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profits through price discrimination is the possibility that a regulated dominant firm will define services and implement price discrimination schemes in order to accentuate the growth of its rate base or attempt to discourage the entry of competing suppliers. In short, price discrimination as a pricing strategy utilized by a regulated dominant firm may result in substantial economic inefficiency in the use of resources and may have a potential anticompetitive effect.

[19] For further discussion of these and other rate structure options, see Edward E. Zajac, *Fairness or Efficiency: An Introduction to Public Utility Pricing* (Cambridge, Massachusetts: Ballinger Publishing Company, 1978), Chapter 4. Also see the references cited in footnote 35.

[20] See Harvey Averch and Leland Johnson, "Behavior of the Firm Under Regulatory Constraint," *American Economic Review* 52 December 1962): 1053–69.

[21] Roger Sherman and Michael L. Visscher, "Rate-of-Return Regulation and Price Structure" in *Problems in Public Utility Economics and Regulation*, ed. Michael A. Crew (Lexington, Massachusetts: Lexington Books, D. C. Heath and Co., 1979), p. 129. (Emphasis added.)

it is highly probable that a substantial proportion of the "allocated costs" of the service will appear as "common costs" shared by other "services". This outcome is not surprising if the new service uses to a considerable extent the *same* facilities as existing services. Moreover, the regulatory rule which distributes the shared or common costs among the carrier's services may become itself a strategic variable that the carrier can vary to achieve corporate objectives. For example, the regulated firm can lower or raise its service-specific costs by increasing or decreasing total shared costs of production and by varying the ratio of direct to common costs for any given service.[22] Since the definition of services and implementation of regulatory cost allocation procedures by a regulated dominant firm may be driven by incentives such as keeping costs low on services facing competitive entry, it should not be surprising that the resulting "allocated costs" may bear little relationship to the underlying facility costs used to provide tariffed "services".

In recent years, the Commission has become aware of some of the pitfalls of regulatory cost allocation as a regulatory tool. In CC Docket 79–245, the Commission revised the fully distributed cost methodology prescribed in Docket 18128.[23] In this decision, cost allocation procedures were simplified and the number of "service categories" was reduced. In CC Docket 79–246, the Commission has begun to recognize the inevitable problems which result when a carrier is given broad discretion in defining services and designing tariffs for such services.[24]

From the Commission's experience with regulatory cost allocation in recent years, it is becoming increasingly apparent that the definition of "services" should closely track the underlying facilities used to transport and switch electronic information. Technical parameters rather than market segmentation strategies should provide the guiding principle for designing a tariff. In other words, the actual facilities used in providing a network service should drive the definition of the service. This principle implies that the pricing of the "rental services" of a telecommunications facility, either on a

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[22] For a recent theoretical analysis of such incentives, see David Sappington and William G. Shepherd, "Sustainability, Entry Restriction, and Induced Technical Bias," *Quarterly Review of Economics and Business* 22 (Winter 1982): 43–52. Also see Roger G. Noll and Lewis A. Rivlin, "Regulating Prices in Competitive Markets," *Yale Law Journal* 82 (June 1973): 1426–1434, Ronald R. Braeutigam, "An Analysis of Fully Distributed Cost Pricing in Regulated Industries," *Bell Journal of Economics* (Spring 1980): 182–96, and Jerry B. Duvall and Michael D. Pelcovits, "Reforming Regulatory Policy for Private Line Telecommunications Services: Implications for Market Performance," FCC Office of Plans and Policy *Working Paper* #4, December, 1980.

[23] *Report and Order in CC. Docket No. 79–245*, 84 FCC 2d 384, *recon. denied*, 86 FCC 3d 667 (1981), *aff'd. sub nom MCI Telecommunications Corp.* v. *FCC*, 675 F.2d 408 (D.C. Cir. 1982).

[24] *Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979).

dedicated or demand basis, should be indifferent to both the *identity* of the user and the *purpose* of the user's traffic placed on the network, unless a clear causal relationship exists between the purpose of the communications traffic and network operating costs. Of course, certain overhead costs in addition to directly-attributable labor expense must still be assigned to a service defined in terms of actual facilities used to provide the service. However, a facilities-driven concept of a tariffed service should more closely approximate the relevant opportunity costs that a user will consider when choosing between the rental of common carrier telecommunications facilities or the building of private communications systems.

This approach to the tariffing of network services simply replicates the reality of the contemporary telecommunications industry. If a large telecommunications user decides to build its own private communications network, it does not build "switched network services" or "dedicated private line services." Rather, it buys switching and transmission *facilities* with given technical parameters. It is the capital cost of these facilities together with their operating and maintenance expenses that provide the baseline comparison between the tariffed "services" of a common carrier and the decision to deploy private bypass facilities.[25] If the tariffed service does not bear a close relationship to the underlying facility costs, then uneconomic bypass may be encouraged.

Regulatory Cost Allocation and the Access Charge Plan. Despite some progress in recent years in recognizing and avoiding some of the pitfalls in the application of regulatory cost allocation, the Commission appears to have ignored this progress in its ACP. How the ACP prices the usage of access lines to the local exchange is especially troublesome in this respect. Rather than define access lines consistently in terms of the actual, physical facilities used to originate and terminate calls, the ACP defines categories of "access service" based on the kind of traffic and the identity of the user. Thus, end users may access the local switch through "common lines," "dedicated access lines," or "special access" arrangements. Interexchange carriers, however, must access the local switch through "dedicated transport" access lines. In some instances, both end users and interexchange carriers will access local exchange plant using *identical* facilities and use such facilities the same way, e.g., line-side terminations on the local switch.

In effect, the Commission, not unlike a regulated carrier, has

[25] It is important to emphasize that the difficult regulatory problem of allocating shared costs to various "services" is minimized if a facilities-orientation to regulatory cost allocation is adopted. After all, a large user which buys its own communications facilities will find few common costs to allocate among "services," since the notion of a "service" for its purposes becomes perfectly transparent, i.e., a regulatory fiction that may bear little relationship to the economic costs of the underlying network facilities.

defined a group of "access services" in the ACP in order to implement a price discrimination scheme based *both* on the identity of the user and the intended use of the access service. For example, Part 69.303(a) of the ACP Rules requires that investment in station equipment included in Separations Category 2 (station equipment provided for private line services) be assigned to the "special access" rate element. However, if the identical voice-grade channel is provided as a "dedicated access line" or "common line," then Part 69.303(d) of the ACP Rules requires that any investment apportioned to interstate and foreign services as a surrogate for customer premises equipment (pursuant to the "Poponoe Plan") be allocated between dedicated access line and common line elements on the basis of the relative number of "equivalent lines" in use. If the same voice-grade channel is provided to an interexchange carrier as "dedicated transport," then no investment in station equipment is directly allocated to the dedicated transport rate element. Instead, transitional station equipment costs will be recovered from interexchange carriers through the usage-sensitive carrier's-carrier charge. Thus, the ACP as a regulatory cost allocation mechanism derives three different "costs" for the same voice-grade channel depending on the identity of the user and the purpose of network access.

Not only do the allocated costs of the same voice-grade channel differ by classification of access service, but also the pricing of the same facility differs from one type of access service to another. For example, after the costs of an end-user common line are jurisdictionally separated, the interstate allocation of costs will be recovered during the transition period by end-user flat rate and mover charges and the carrier's-carrier charge. If the same voice-grade channel is provided as dedicated transport to an interexchange carrier, the facility will be priced on a "per unit of capacity" basis with separate rate elements for interface and conditioning arrangements per Part 69.112 of the ACP Rules. If the same voice-grade channel is provided as special access, it is unclear how the facility will be priced, since Part 69.113 gives the exchange carrier considerable discretion in setting rates for this classification of access service.

The inefficient price discrimination embedded in the Commission's ACP is the inevitable consequence of four controversial assumptions, viz., the need to maintain the current mechanism for the jurisdictional allocation of NTS costs; the need to subsidize high cost telephone companies rather than consumers who may require subsidized access to telephone service to remain on the network at cost-based prices; the need to fund the subsidy of high cost telephone companies indirectly from end users through a carrier's-carrier charge rather than directly through a surcharge on end-user access lines; and the need to compensate for AT&T's competitive advantage as the major incumbent interexchange carrier. I question the validity of the first three assumptions, a position that I fully explain

in my proposed alternative plan. I agree with the validity of the last assumption, but I believe the Commission's ACP does not adequately address this issue.

It is not surprising that the Commission's ACP prescribes discriminatory, non-cost-based rates for network access given the four underlying assumptions of the plan. Clearly, if one group of users of network access, viz., interexchange carriers, must be singled out for purposes of "regulatory taxation," then the criteria for discriminatory treatment must be unabiguous and easily enforceable. Since it will be difficult for an interexchange carrier to pass itself off as an ordinary business line customer, it should be easy to enforce the discriminatory rate classifications of end users and interexchange carriers. Moreover, so long as the Commission's ACP prices out the entire allocated cost of some facilities (e.g., interstate dedicated access lines) but only portions of others (e.g., the interstate portion of common lines), then separate but discriminatory classifications of access service must be maintained to preserve the economically-irrational jurisdictional separation of NTS local exchange costs.

This outcome is truly paradoxical. Rather than adopting a plan fully supportive of its MTS and WATS open entry policy established earlier in this proceeding, the Commission has instead adopted a plan more supportive of the status quo, including jurisdictional cross-subsidies and discriminatory, non-cost-based prices for network access. Equally paradoxically, the Commission's ACP embodies the very pitfalls of regulatory cost allocation that the Commission in other dockets has attempted to correct. I object to these inconsistencies and hope that the Commission will closely examine them on reconsideration of this decision.

The Transition to Equivalent Network Access. The FCC's open entry decision in this proceeding is necessary for competition in the MTS and WATS market but alone is not sufficient. Over the years, AT&T engineered its local exchange facilities and long haul network as an integrated whole. As a result, competing interexchange carriers have been unable to access local exchange facilities in the same way as AT&T Long Lines. The OCCs generally have accessed the local exchange via line-side terminations on the local switch rather than the trunk-side terminations provided to AT&T Long Lines. An essential aspect of the Modified Final Judgment (MFJ) is the provision that requires the divested Bell Operating Companies (BOCs) to make available "premium" access to all interexchange carriers, not just AT&T Long Lines, by the conclusion of a prescribed transition period. Once equivalent access is made available to all interexchange carriers, the sufficient condition for intercity transmission competition will be satisfied, and all interexchange carriers will be able to compete on an equivalent basis of local exchange interconnection.

Until equal interconnection is available to all interexchange carriers, AT&T Long Lines receives a competitive advantage by virtue of its incumbency as the former monopoly interexchange carrier. This advantage exists even though new digital switches may be able to provide trunk-side access features as cheaply as line-side access. From an economic perspective, however, the implicit demand for premium access has increased with the entry of the OCCs, although the short run supply of premium access as provided by the BOCs is essentially fixed. Thus, the "opportunity cost" of premium access has increased. Efficient pricing of premium access during this short run transitional period requires that AT&T pay a "quasi-rent" per unit of premium access until the BOCs can increase the supply of premium access to accommodate more than a single intercity carrier.[26]

There are two aspects of the transitional pricing of premium access, viz. the pricing of the actual trunk-side connection to the local switch and the high-capacity transport facilities (trunks) that carry AT&T Long Lines' traffic from its toll office to the local switch. In my view, the Commission's ACP deals inadequately with both aspects of the transitional pricing of premium access as received by AT&T Long Lines.

The conceptual approach in the Commission's ACP for pricing the actual trunk-side connection to the local switch is correct. The ACP realistically acknowledges the practical difficulties in estimating the opportunity cost of premium access as provided to AT&T Long Lines. Linking the amount of the premium access charge, however, to interstate CPE costs or surrogate CPE costs as specified in paragraph 165 of the order is both arbitrary and nonsensical. Given the practical impossibility of "auctioning" premium access to the highest bidder, a better approach would simply begin with the proposition that AT&T should pay a premium access charge such that an "appropriate" differential is maintained between the price of line-side and premium interconnection that reflects the short term scarcity value of the superior interconnection that the BOCs provide AT&T. How large should the "appropriate" differential be? A reasonable answer to me is that the amount of the *initial* premium access charge paid by AT&T should be sufficient to maintain the existing *percentage* differential between the ENFIA per minute charge (SEP amount) paid by the OCCs and the effective per minute charge paid by AT&T for premium interconnection through separations and settlement. This differential could then be phased down to zero as premium access becomes available to all interexchange carriers.

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[26] This point is more fully discussed in Jerry B. Duvall, "Telephone Rates and Rate Structures: A Regulatory Perspective," paper presented at the *Workshop on Local Access: Strategies for Public Policy*, St. Louis, Missouri, September 16, 1982.

This approach to determining the amount of AT&T's premium access charge starts at the status quo and reflects a price differential that the Commission found to be in the public interest in its recent ENFIA decisions. Whether this differential accurately measures the quality differences between line-side and premium network interconnection is, of course, problematic. Nevertheless, I believe that the Commission, having found that competition in the MTS and WATS market is in the public interest, should err on the side of encouraging, *not* discouraging, entry. After all, new competitors enter the MTS and WATS market at their own risk and with private capital. Whether these entrants succeed or fail when the differential disappears following the transition period is a problem only for the competitors, not for a regulatory agency. The Commission's objective should be the support and maintenance of competition in the industry. As this competition develops, the Commission can begin to reduce and eventually eliminate the regulation of all participants in the MTS and WATS market and thereby reduce the social cost implied by such regulation.

By setting the initial amount of premium access at only $1.4 billion, the Commission's ACP adopts the view that the effective percentage differential paid by the OCCs and AT&T should narrow considerably effective January 1, 1984.[27] The ACP provides no rationale whatsoever for this important public policy decision, and I respectfully dissent from this part of the Commission's ACP.

The transitional pricing of the high volume transport facilities used by AT&T Long Lines to terminate its traffic on the local switch raises a problem analogous to the pricing of premium interconnection. By virtue of its large share of all interexchange traffic resulting from its former status as the monopoly interexchange supplier, AT&T in most cases transports traffic from its toll offices to the local switch via direct, high-volume, dedicated trunks, rather than intervening tandem switches. Such trunks provide AT&T with substantial economies of scale in transporting traffic to end offices. Lacking AT&T's market share advantage derived solely from AT&T's former monopoly status, the OCCs cannot as yet efficiently utilize high capacity dedicated trunks and in many cases must use common trunk capacity with tandem switching for transporting traffic from the OCC's point of presence to the local switch. As a result, the unit cost of transport for an OCC is probably higher than for AT&T and consequently provides AT&T with a competitive advantage that is unrelated to any "survival test" in the MTS and WATS market.

The Modified Final Judgment explicitly recognized this transitional problem and mandated that the BOCs provide exchange access on an unbundled, tariffed basis that is "equal in type, quality, and

[27] See "Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure," p. 12.

price to that provided to AT&T and its affiliates." The basic idea is to average the costs of transport over low and high capacity facilities to even out AT&T's cost advantage during the transition to equivalent interconnection and to give the BOCs an opportunity to reconfigure their exchange facilities to accommodate multiple interexchange carriers. The approach prescribed by the MFJ is certainly one way to deal with this transitional problem. I am not sure, however, that it is the best approach or whether the Department of Justice in fact has the authority to prescribe a pricing methodology for network access. In my opinion, this matter clearly falls within the purview of the Commission. Nevertheless, the problem is real, and the MFJ offers one possible solution.

As an alternative approach, the ACP Rules prescribing the computation of common and dedicated transport access charges could be amended to levy a "premium transport" charge on AT&T to reflect its competitive advantage during the transition to equivalent interconnection and reconfigured transport facilities. This approach would at least keep the rates for common and dedicated transport somewhat closer to cost for interexchange carriers other than AT&T in contrast to the MFJ approach where cost averaging insures that no transport rates will reflect costs for any interexchange carrier. Whatever the approach, it is not clear to me that the Commission's ACP adequately addresses this problem, especially if AT&T's current trunking capacity is defined by the ACP Rules in Part 69.112 as mostly "dedicated transport" while the OCCs' equivalent facilities are classified as mostly "common transport." The difficulty with assessing the significance of this particular problem is the lack of illustrative data in the decision that might have provided some sense of the quantitative impact of applying the Commission's ACP Rules. Lacking such data, it is impossible for me to evaluate the possible deleterious effect of this aspect of the ACP on competition in the MTS and WATS market. I believe, however, that this matter should be given a careful look by the Commission on reconsideration of the ACP decision.

The Effect of Surrogate Charges on Competition. During the phase-in period of end-user flat charges for network access, Part 69.206 of the ACP Rules prescribes that a surcharge be levied on all interexchange carriers that offer MTS, In-WATS, FX, CCSA or CCSA equivalent service as a surrogate for usage charges upon an end user that originates a collect MTS or In-WATS call or originates an FX, CCSA or CCSA-equivalent call at the open end. This rule will be costly to implement, will introduce needless temporary distortions in the pricing of private line services, and may have an anticompetitive effect.

It must be emphasized that this costly rule is needed only to compensate for a defect in the end-user mover charge mechanism. Rather than eliminate the mover charge mechanism and the

inefficiencies it creates (as already discussed), the ACP prescribes yet *another* distortionary rule to "patch up" the defects of the first. Together, the end-user mover charge mechanism and the surrogate charge rule create pointless complexity and economic waste that could be completely avoided. These two aspects of the ACP alone provide a clear example of needless social cost induced solely by regulation.

As a result of the surrogate charge rule, the total user cost of using interstate private line services such as FX lines will now include *two* types of interstate usage-sensitive charges during the transition period, viz., the surrogate charge and the interexchange carrier's-carrier charge. Although the surrogate charge is only a temporary phenomenom, it is unfortunate that the only category of interstate transmission service that has been priced efficiently in terms of its rate structure will now be priced inefficiently.

Taken by itself, the temporary distortion in the pricing of private line service may appear inconsequential. The cumulative effect, however, of other distortions in the ACP on private line services may have a significant effect on their "allocated" cost. For example, an ordinary business (non-carrier) subscriber to FX service will access the local exchange via a dedicated access line. As noted previously, Part 69.303(c) of the ACP Rules allocates a pro rata share of station equipment costs to the dedicated access line rate element. These costs are in addition to the actual costs of the facility itself. Consequently, the ACP requires that this component of FX service depart from its economic cost. Part 69.206 requires that the interexchange carrier providing the interexchange portion of FX service, i.e., an interstate private line, be assessed a carrier's-carrier charge on all calls plus a surrogate charge for all calls to an FX subscriber that originate at an FX open end. Presumably, the interexchange carrier will recover the carrier's-carrier and surrogate charges from the FX subscriber, possibly on a usage basis. However the interexchange carrier chooses to recover its carrier's-carrier and surrogate charges, the FX subscriber will ultimately have to absorb not only these charges but also the costs associated with the billing of surrogate charges.

An interexchange carrier that subscribes to the *identical* FX facility just described (e.g., for use as part of its public switched service) will pay different "allocated" costs under the ACP. The carrier will access the local exchange via dedicated transport facilities as prescribed in Part 69.112 of the ACP Rules. This facility may be exactly the same facility used by the ordinary business customer. Nevertheless, the allocated costs of the facility will differ given the different regulatory cost allocation rules for the various categories of access service. Among other differences, no station equipment investment is directly assigned to the dedicated transport rate element. By virtue of its status as an interexchange carrier, the

carrier will be subject to carrier's-carrier charges when using the leased FX facility in addition to any surrogate charges resulting from incoming open end FX usage. The effective cost of FX facilities to interexchange carriers is difficult to estimate, given the unknown effects of carrier's-carrier and surrogate charges. It seems clear, however, that the allocated costs of FX service will depart sharply from the economic costs of the underlying private line facilities. Thus, to achieve price "parity" or "equity" between interstate switched and private line services, the ACP has mandated substantial economic inefficiency for a transition period. Since telecommunications is both a final and intermediate good, the economic waste generated by such inefficient pricing will be incorporated into the pricing of virtually every good or service that requires telecommunications as an input to production and distribution. The conscious generation of such economic waste by a regulatory agency seems difficult to justify.

The ACP properly acknowledges in paragraphs 190 and 191 the technical problem that a local exchange carrier will have in measuring interstate usage of common lines for subscribers who use an OCC for their interstate long distance calling.[28] A local exchange carrier may find it very difficult to apply accurately the end-user mover charges for customers of interexchange carriers using ENFIA A line-side terminations to originate and terminate their long haul traffic. The ACP purports to deal with this problem by requiring all local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any. The ACP anticipates in paragraph 191 that the OCCs will in fact take advantage of this exchange carrier service that will make possible the accurate billing of end-user mover charges generated by OCC customers. As an alternative to having exchange carriers provide the OCCs with billing services, footnote 63 in the ACP allows exchange carriers to file waiver petitions to permit them to impose surrogate ENFIA A charges on the OCCs if the local exchange carrier can demonstrate that it is not otherwise feasible to collect the mover charges directly from end users who are OCC customers.

Given the costs that a local exchange carrier would have to incur in order to monitor the interstate usage of common lines by OCC customers for just a transition period, two factors suggest that exercise of the waiver option by exchange carriers is highly probable. First, local exchange carriers may not want to invest in line measurement equipment that may have little value following the end of the transition period. Second, the OCCs may have a major incentive to do their own billing rather than have the local exchange

[28] The difficulties involved in assessing the end-user mover charge for local exchange subscribers that use an OCC for long distance calling are essentially the same as those difficulties involved in estimating the same charges for incoming calls on an FX open end.

carrier do it for them. It must be recognized that the BOCs will in many cases be competing with the OCCs for intraLATA toll business. It is not obvious that an OCC would eagerly turn over its traffic data to its major intraLATA competitor for billing purposes.

Moreover, the billing services provided by the local exchange carriers will be unregulated. Thus, the local exchange carriers through strategic pricing of their billing services will be able to discriminate between high and low volume interexchange carriers and consequently be able to influence the OCCs' internal tradeoff between cost-effective billing services and the value of not releasing sensitive billing data to potential or actual intraLATA competitors.[29] For example, the BOCs could price their billing services above the OCCs' stand-alone billing costs and thereby discourage the OCCs from using BOC-provided billing service. The BOCs could then seek a waiver per footnote 63 and impose a surcharge on the OCCs. The OCCs would then have to collect the surrogate charges from their customers. Once the costs of this billing complexity are passed on to OCC customers, the OCCs may be competitively disadvantaged vis a vis other interLATA carriers that have premium network access that provides less costly measurement of end-user mover charges triggered by interstate toll calling. It is possible that the combination of the initial reduction in the differential in price between line-side and premium access plus the surrogate charges on ENFIA A lines may be sufficient to eliminate almost entirely the difference in price paid by the OCCs and AT&T for network access. Whatever the net impact on competition, the ACP is completely silent concerning the potential competitive problems that collection of mover charges might imply.

Implications of Pooling and ACP Administration. As the previous discussion has shown, the Commission's ACP is not closely linked to the principle of cost causation. Consequently, the ACP introduces a new set of inefficient, discriminatory rates for network access that presumably will reduce the discriminatory rate differentials between interstate MTS/WATS and private line service. Various provisions of the ACP that establish procedures for implementing and administering the plan exacerbate the deviation from cost-based pricing and increase the possibility of collusive, anticompetitive conduct among exchange carriers.

The funding of the Universal Service Fund and the recovery of transitional "carrier common line" costs through a carrier's-carrier charge not only creates economic inefficiency in the pricing of network access but also requires mandatory pooling of certain rate

[29] As local exchange carriers are increasingly subject to the threat of actual or potential entry of competitors that offer alternative local distribution services, the conduct of the incumbent exchange carriers will most likely resemble the strategic behavior of any dominant firm that desires to maintain its market position.

elements of the carrier's-carrier charges. Of course, no pooling arrangement would be necessary for purposes of the USF if a "tax" were imposed on all access lines with the proceeds collected by the telephone company and forwarded to an existing local public body for direct distribution to qualified telephone subscribers requiring financial support. Part 69.105 of the ACP Rules prescribes a uniform, nationwide charge per conversation minute for all interexchange carriers to recover the carrier common line charges. Since the costs of local exchange service will differ from one study area to another and even from one wire center to another, some pooling arrangement is necessary. Again, if local carriers were permitted to "bill and keep" such transitional charges to fund the carrier common line revenue requirement specific to a given study area, no pooling would be required.

The ACP notes in paragraph 314 that pooling of carrier common line charges is necessary to mitigate in part the effects that unlimited rate deaveraging might produce. This concern is puzzling, since the end-user mover charge will effectively result in the deaveraging of the rates of interexchange carriers as a function of the end user's geographic location and volume of interstate calling. Since interexchange rates are effectively deaveraged anyway through operation of the transition plan, there seems little point in incurring both the direct costs of administering a pooling arrangement and the social costs of the inefficient pricing of network access through transitional and permanent carrier's-carrier charges.

Notwithstanding the needless out-of-pocket and social costs generated by pooling, the ACP prescribes additional access charge inefficiencies by placing a severe constraint on the extent of disaggregation that an exchange carrier may use in deriving the allocated costs for access rate elements that are not pooled. The ACP Rules currently prohibit access tariffs that are disaggregated within a study area. Such a restriction is arbitrary and represents yet another instance where the ACP will drive the price of network access away from cost. Administrative convenience for tariff review purposes seems the only logical rationale for such a restriction. As an alternative, the extent of cost disaggregation could be left to the discretion of the state PUCs. If access charge tariffs were filed with state PUCs rather than the FCC, the administrative burden on the FCC could be lightened and access tariffs could move closer to the actual costs of local exchange access at the discretion of the state PUCs.

Paragraphs 321 and 322 of the ACP also place further restrictions on the ability of local exchange carriers to move toward cost-based access tariffs for traffic-sensitive costs. Any carrier that is part of an extended area service (EAS) agreement with other local exchange carriers must reach agreement with all participating carriers before a separate tariff for the traffic-sensitive rate elements of the access

tariff can be filed in lieu of the national common tariff. The necessity for such agreement among all EAS partners means that a high-cost EAS partner can effectively prevent a low-cost EAS partner from disaggregating its EAS costs and attempting to bring its traffic-sensitive access charge rate elements closer to cost for some portion of an extended service area. This restriction effectively nullifies any potential competition between EAS partners for providing access to interexchange carriers. Of course, the existence of EAS agreements complicates the design and administration of access tariffs. Such complexity, however, provides little justification for preventing competition among EAS partners for the access business of interexchange carriers. This restriction is both inefficient and anticompetitive in nature.

The Exchange Carrier Association (ECA) established by the Commission's ACP is necessitated by the pooling requirements of the plan. I object to the creation of the ECA and question the Commission's authority to mandate the existence of such an organization. As a matter of public policy, the ECA is unnecessary since pooling is unnecessary. Nevertheless, given the reality of the ECA, its organization and membership should not be an obstacle to the further competitive development of the telecommunications industry. I fear, however, that the ECA organization contemplated by the Commission's ACP will prove a hazard to telecommunications competition. Paragraph 345 of the ACP limits membership in the association to exchange carriers that participate in access charge revenue pools administered by the ECA. Moreover, the governing board will be composed exclusively of exchange carrier representatives.

It must be emphasized that the membership of the ECA will consist entirely of competitors in the market for network access, terminal equipment, and other communications services that will cross jurisdictional boundaries. Taking a narrow view of the extent of actual or potential competition among the membership, i.e., a view that perceives ECA members only as local monopoly suppliers of exchange access, completely overlooks the other dimensions of potential rivalry among the ECA membership. Thus, the ECA and the BOC central organization as prescribed by the MFJ will provide an opportunity for collusive behavior among local exchange carriers. This possible outcome is totally inconsistent with the Commission's general support of competition in the telecommunications industry.

Local Dial Switching Investment and the Rate of Return. Paragraphs 91 and 214 in the Commission's ACP prescribe the allocation of NTS central office equipment on a usage-sensitive basis. The explanation provided in footnote 75 to rationalize this departure from the *Separations Manual* is unpersuasive. The current Joint Board in CC Docket 80–286 may ultimately adopt this change in the classification of central office equipment. Until the Joint Board

makes this determination, however, it is inappropriate for the ACP to prescribe this change. If the intent of the ACP is to minimize the amount of NTS investment to be recovered through end-user flat charges, the ACP should be candid on this point and not attempt to anticipate the findings of the Joint Board.

Paragraph 254 of the ACP prescribes the exchange carriers target their access tariffs to earn AT&T's authorized rate of return on its interstate services, presently set at 12.75%. This rate of return prescription may create an incentive for exchange carriers to bias the assignment of expenses and investment toward access services if the rate of return authorized by the ACP exceeds the allowed rate of return on intrastate plant set by individual state PUCs. This incentive may be especially acute in areas where bypass of the exchange carrier is not a significant short term threat. A rule that simply requires an exchange carrier to target its access tariffs to recover the same rate of return as its intrastate operations would have avoided this incentive to misallocate resources.

Universal Service. A further objection that I have to this order rests in its discussion of the "universal service objective" of the Communications Act. *Access Order*, paragraphs 80–84. Although I agree with my fellow Commissioners that we should consider the impact that our rate decisions may have on telephone subscribers and, if possible, avoid decisions that might result in a large number of disconnects, I fear that the discussion of "universal service" contained in this order goes too far. This order concludes that "universal service" is an objective of the Communications Act and implies that any FCC action that might cause telephone subscribership to drop below its current level would be contrary to the Act. I do not believe that this is what Congress intended.

Section I of the Communications Act directs the Commission to make service "available, so far as possible, . . . at reasonable charges." 47 U.S.C. 151. Nothing in that language suggests that the Commission is restricted from making decisions that might cause a decrease in telephone subscribership, so long as service is "available" and the charges for that service are "reasonable." I fear that the discussion at paragraphs 80–84 of this order will encourage objectors to argue that the Commission has determined that any substantial change in rates for basic telephone service is contrary to the Communications Act. I believe that this is likely to make it more difficult for the Commission to maintain its competitive policies and enforce cost-based pricing. I therefore dissent from this portion of the order.

Conclusion. The Commission's ACP is a *reaction* to the emergence of competition in the telecommunications industry, not a forward-looking plan designed to accommodate new competitive entry into the industry consistent with the Commission's policy decision made earlier in this proceeding. Other than initiating the transition of

interstate NTS local exchange costs toward end-user flat charges, the ACP seems otherwise firmly committed to supporting, even defending, the status quo. As a result, the ACP has a strong protectionist flavor. Under the guise of "universal service," the ACP seeks to protect local exchange carriers from the vagaries of rapid technological change and to preserve those regulatory practices that have successfully suppressed competition in the past and have permitted the pricing of telecommunications services that is little related to the economic costs of production. As a result, it is not suprising that the old industry "partnership" with its settlements procedures intact (paragraph 332) has resurfaced as the Exchange Carrier Association. Moreover, discriminatory rate structures, a prominent feature of telecommunications pricing since Theodore Vail, remain firmly in place. Even the shifting of interstate NTS local exchange costs from interstate switched services to local exchange carriers is largely justified in the ACP by the real and present threat of local exchange bypass, not the $1.6 billion potential improvement in consumer welfare that cost-based pricing of telecommunications services will bring to the American public. It is both curious and odd that a federal regulatory agency charged with the welfare of interstate ratepayers has adopted a plan that seems less concerned with promoting and protecting their interests than with safeguarding the economic viability of local telephone companies.

I think the Commission must begin to realize that it can no longer have it both ways, i.e., pro-competition on some policy issues while "business as usual," monopoly-world regulation on others. The recent action by the Joint Board in CC Docket 80–286 is a dramatic case in point. The four "principles" which the Joint Board majority approved, and I dissented from, ignore completely the reality of telecommunications competition by failing even to mention it and by stressing the importance of protecting telephone companies by the "permanent protection of universal service." The reality is that monopoly-type regulation is fundamentally inconsistent with competition in the telecommunications industry. Pretending otherwise by clinging to the past will benefit neither consumers nor the industry as telecommunications emerges as the foundation of the information economy. Courageous regulatory leadership that peers beyond the past and present is needed now to rationalize pricing in this vital sector of the American economy.

As I have attempted to show in some detail, many of the complexities of the Commission's ACP are wholly unnecessary and do not result from any unique complexities inherent in the pricing of network access. A far simpler but comprehensive plan keyed to the future of the industry rather than its past offers major advantages to consumers.

The Pricing of Local Exchange Access: A Federalist Approach[30]

My approach to the pricing of local exchange access is straightforward and administratively simple. Moreover, it reflects a modern view of the appropriate role of government intervention in monopoly markets, namely, assuring nondiscriminatory access to facilities that represent substantial "sunk cost" barriers to entry and *exit*.[31] Clearly, local telephone facilities involve substantial sunk costs that make market entry by competing telephone companies exceedingly costly, even if such entry were lawful. Therefore, rules which prescribe the terms and conditions of access to local exchange facilities will promote efficient use of such facilities and will permit the further development of intercity transmission competition.

Federal Jurisdiction Over All NTS Costs. The first step in my access charge plan is the assertion of federal jurisdiction by the FCC over all non-traffic sensitive (NTS) and appropriate traffic-sensitive (TS) costs involved in accessing local exchange facilities for originating and terminating long haul traffic. It is time to accept and deal with the simple truth that an arbitrary allocation of NTS costs between the intrastate and interstate jurisdiction has no economic or technological reality. An access charge plan that maintains this legal dichotomy (and economic fiction) leads inevitably to at least three network access classifications, viz., "interstate toll access," "intrastate toll access," and "local service access." If the actual physical connection to the local exchange is a line-side termination, then the same, identical facility may be tariffed at three different rates under three different rate structures. Wholly arbitrary cost allocations are then necessary to implement "cost-based" pricing of such "service categories," since the defined services are regulatory fictions—they simply do not exist in a technological sense.

These arbitrary allocations create significant social cost since regulators have to exert a major effort to enforce the regulatory distinctions. Unless the rates and rate structures are nearly the same for each classification of access service, there is a strong incentive for interexchange carriers to arbitrage the differences in rates by configuring their networks to "look like" interstate or intrastate facilities depending on the relative price of interstate vs. intrastate access. Multipart, jurisdictional classification and pricing

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[30] The following discussion is based in substantial part on my paper entitled "Contemporary Issues in Telecommunications Pricing" presented at the *Ninth Annual Rate Symposium on Present and Future Pricing Issues in Electric, Gas, and Telecommunications Industries*, Kansas City, Missouri, February 7, 1983.

[31] See Elizabeth E. Bailey, "Contestability and the Design of Regulatory and Antitrust Policy," *American Economic Review* 71 (May 1981):178–183. More generally, see William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and The Theory of Industry Structure* (New York: Harcourt Brace Jovanovich, Inc., 1982).

of local exchange access is, in reality, a scheme of price discrimination where the costs of local exchange access are apportioned and recovered in access tariffs on the basis of the *identity* of the class of users, i.e., local service end users, intrastate interexchange carriers, or interstate interexchange carriers. The cost allocations among these user classes must be arbitrary, since these access service categories are regulatory fictions and not based on cost causation.

This regulatory morass with its discriminatory rate structures, tariffing complexity, incentives for arbitrage, and regulatory enforcement costs can be completely avoided by assertion of federal jurisdiction by the FCC over all NTS and TS costs of local exchange access. I recognize that this proposal represents a significant change from current regulation and is likely to draw legal fire. I submit that the Commission can legally adopt this proposal, however, for the following reasons.

The FCC's authority to assert jurisdiction over access costs and require unified access tariffs derives from the Communications Act mandate that the Commission "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. To fulfill this mandate, the Commission occasionally is required to reexamine and rethink existing regulatory policy to ensure that it is consistent with the statute's objectives. See generally, *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979). And, when it appears that changes in the industry warrant changes in the Commission's regulatory efforts, the Commission is empowered to make adjustments and thus "avoid the necessity of repetitive legislation." *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). See also *General Telephone Co. of California* v. *FCC*, 413 F.2d 390 (D.C. Cir.) *cert. denied* 396 U.S. 888 (1969). In fact, the Commission, with judicial approval, has radically altered much of its regulatory policy in recent years to accommodate the modern telecommunications environment. *E.g. Computer and Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, U.S.L.W.—(U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352) (*Computer II*).

Unified treatment of access costs is both desirable and necessary in today's telecommunications environment. It will facilitate open entry into the industry and thus produce the public benefits that competition fosters. It will eliminate the need for arbitrary cost allocations and subsidy schemes that encourage uneconomic bypass of the network. And, it will conform regulation of access charges to the reality of the post-divestiture telecommunications industry structure. These goals cannot be accomplished if the current system of split regulation of access costs continues. So long as there is a pretense that there is a difference between interstate access and intrastate access and an arbitrary allocation of costs to accommodate

that pretense, there will be an incentive for irrational regulation that is inimical to development of a rapid, efficient telecommunications system in which access charges are cost-based and non-discriminatory.

Challenges to the legality of my proposal are likely to center upon two main themes: first, that unification of access charges is contrary to the Supreme Court's decision in *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930); and second, that unification under the federal jurisdiction works an impermissible preemption of state authority to set local rates. Neither argument is insurmountable.

With regard to *Smith*, it seems entirely reasonable to conclude that the Supreme Court's analysis in that case cannot prevent the FCC from finding that an arbitrary allocation of access costs between the interstate and intrastate jurisdictions is no longer consistent with the goals of the Communications Act. *Smith* was decided in 1930. This was before Congress created the FCC and gave it the "comprehensive mandate" with "expansive powers" that the courts have recognized for many years. See *National Broadcasting Co.* v. *FCC*, 319 U.S. 190, 219 (1943). See also *General Telephone of the Southwest* v. *FCC*, 449 F.2d 846, 853 (5th Cir. 1971). It also was before technological development eroded the foundations of the monopoly market structure that existed in 1930, making competitive entry into the interexchange market possible and viable. Finally, and perhaps most importantly, it was well before the announcement of AT&T's divestiture of the Bell Operating Companies, an event that will make the technical and economic distinction between local service and long distance service even clearer.

I submit that *Smith* need not be read as a Supreme Court order that costs associated with plant used for both interstate and intrastate service always must be divided between the two jurisdictions. Rather, I advocate a more limited reading of the case as a statement that, in an environment where monopolized end-to-end communications service and rate base regulation were the norm, a state rate prescription that failed to recognize federal jurisdiction over commonly used plant was unlawful. Viewed in this light, it is apparent that *Smith* is not a bar to the adoption of my proposal.[32]

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[32] The validity of this conclusion is not diminished by the fact that the FCC and the states have cited *Smith* as the basis for jurisdictional separations of access costs for many years. In situations such as this, where recently changed circumstances warrant rethinking of a regulatory approach, the Commission is not bound by its past practice so long as it recognizes that it is implementing a change and explains it. See *Greater Boston TV Corp.* v. *FCC*, 444 F. 2d 841, 852 (D.C. Cir. 1970). See also *Chisolm* v. *FCC*, 538 F. 2d 345 (D.C. Cir.) *cert. denied*, 429 U.S. 890 (1976), FCC is not precluded from changing its mind as to the limits of its statutory authority.

Nor is the validity of this conclusion diminished by the legislative history of Section 410(c) of the Communications Act. There, in the course of enacting legislation that

The second likely argument against adoption of my proposal is that it would work an unwarranted interference with state ratemaking authority in violation of Section 2(b) of the Communications Act.[33] In assessing this argument, it is important to recognize the very limited degree of preemption inherent in my proposal. In effect, my proposal would remove certain NTS and TS costs from the intrastate rate base and make recovery of those costs subject to federal oversight necessary to maintain the effectiveness of our federal open entry policies. I do not propose that the Commission set the actual rates for access; this would be left to state discretion within federal guidelines.

Recent preemption caselaw indicates that this type of limited intrusion upon state ratemaking powers is permissible under 2(b). In *NCUC II*, for example, the Fourth Circuit Court of Appeals rejected an argument that the FCC's terminal equipment registration program (which facilitated customer ownership of such equipment, thus removing some of the costs of that equipment from the intrastate ratebase) was impermissible under 2(b) because it would reduce state ratemaking options. 552 F.2d at 1048. The court concluded that the FCC's jurisdiction over jointly-used plant was primary, and thus, action intended to promote federal policy could impose limits upon state regulatory authority. *Id.*

Similarly, in its recent decision in *Computer II*, the D. C. Circuit rejected arguments that FCC ordered detariffing of all CPE (entirely removing those costs from the intrastate ratebase) violated 2(b). In that case, the Court indicated that so long as the Commission "has neither attempted to set rates for intrastate communications services or facilities nor asserted jurisdiction over matters of state concern because of intrastate discrimination against interstate business," its actions are not contrary to the purpose of 2(b).[34]

Rate Structure Rules for Network Access Tariffs. I propose that

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codified state participation in the jurisdictional separations process, Congress recognized *Smith* and its influence on telecommunications regulation. I submit that a fair reading of this history does not evidence a legislative intent to enshrine *Smith* or the jurisdictional separations process, but solely an intent to ensure state participation in the process so long as it existed.

[33] Section 2(b) was enacted in response to the Supreme Court's decision in the so called *Shreveport* case. *Houston, E. and W. Texas Ry.* v. *United States*, 234 U.S. 342 (1914). In that case, the Supreme Court held that the ICC could suspend rates set by a state regulatory agency in order to allow carriers to raise local rates to the level existing on similar federal routes. In enacting 2(b), Congress specifically indicated that it did not want the FCC to have such authority. See discussion *North Carolina Utilities Commission* v. *FCC*, (*NCUC I*), 537 F.2d 782, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, (*NCUC II*) 552 F. 2d 1036, 1047 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[34] 693 F.2d at 216. In fact, the FCC action that I propose is far less intrusive upon state ratemaking options than the decision to detariff CPE. In that situation, all CPE was removed from state rate regulation. Under my proposal, the states would retain significant ratemaking powers over access costs. See also *People of California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1976) *cert. denied*, 434 U.S. 1010 (1978).

the FCC prescribe general rate structure rules for recovering all NTS and TS costs involved in providing access to local exchange facilities. Such rules would grant state public utility commissions considerable discretion in setting rate *levels* for access tariff rate elements but impose general rules or "rate structure guidelines" for designing any network access tariffs. An example of such general rules would be the prohibition of inefficient price discrimination schemes based on arbitrary segmentations of customer groups. State PUCs would continue to review and approve a local carrier's revenue requirement and authorized rate of return on its rate base. The relevant rate base, however, would include all the costs associated with exchange access.

The FCC-prescribed rate structure rules would establish principles that local telephone companies must follow in designing "efficient rate structures," i.e., rate structures that track so far as possible the actual economic costs of exchange access and usage. Such guidelines might include self-selecting, two-part tariffs; nonlinear or "tapered" rate structures; premium flat rates; and other cost-based rate structures that would promote economically-efficient usage of local exchange facilities, facilitate nondiscriminatory access to local exchange plant by *all* users, and permit full recovery of all NTS and TS costs of local exchange access.[35] State PUCs would retain considerable discretion, however, in designing specific rate tapers or multi-part tariffs as prescribed by the FCC's general rate structure guidelines. Different *qualities* of local exchange access would be offered pursuant to tariffs which are separate but similar in structure to a generic, "line-side" access tariff.

Administratively, the access tariffs would be filed with the state PUCs, not the FCC. This procedure would not be burdensome, since a single tariff would replace many of the existing tariffs presently filed with state PUCs. The FCC would retain an oversight function and accept petitions that allege violations of the federal rate structure rules.

The assertion of federal jurisdiction over all costs of local exchange acces eliminates entirely the need to create artificial classifications of network access. All rate discrimination based solely

[35] Theoretical discussions of various rate structure options include Gerald R. Faulhaber and John C. Panzar, "Optimal Two-Part Tariffs With Self-Selection," Bell Laboratories *Economic Discussion Paper* #74, January 1977; K. W. S. Roberts, "Welfare Considerations of Nonlinear Pricing, *"Economic Journal* 84 (March 1979):66–83, R. D. Willig, "Pareto-Superior Nonlinear Outlay Schedules," *Bell Journal of Economics* 9 (Spring 1978):56–69, and Bridger M. Mitchell, "Alternative Measured-Service Structures for Local Telephone Service" in *Issues in Public-Utility Pricing and Regulation*, ed. Michael A. Crew (Lexington, Massachusetts: Lexington Books, D. C. Heath, 1980), pp. 107–123. A non-technical summary of some of the recent theoretical literature on efficient rate structures is provided by Duvall, "Telephone Rates and Rate Structures: A Regulatory Perspective."

on the class or identity of the user would be eliminated, since classifications of local exchange access drawn along arbitrary regulatory boundaries would no longer exist. For example, any telecommunications user accessing local exchange plant through "line-side" terminations at the central office would take such service pursuant to a uniform tariff. Thus, the current tariff classifications of residential, business, and interexchange carrier (ENFIA) would cease to exist. If such users subscribe to identical line-side access, they will be subject to the same tariff.

While this concept may appear revolutionary as applied to the pricing of telephone service that has traditionally reflected discriminatory, "value-of-service" pricing principles, it is, nonetheless, a commonplace reality in most unregulated markets. By analogy, this principle would bar a supermarket from attempting to segment its customers by sex and charging female customers one price for bread and males another. Since there is no cost difference in selling bread to males in comparison to females, such a personal price discrimination scheme—if it could be enforced—would be injurious to the sex forced to pay the higher price and would encourage an inefficient allocation of resources, i.e., the price of bread charged to the discriminated sex would not approximate marginal cost. Such an example of inefficient price discrimination seems almost ludicrous within the context of an unregulated market. But the long tradition of a similar type of inefficient price discrimination in the pricing of local exchange access—business vs. residential local loop service—has not been seen for what it is, i.e., a system of inefficient (possibly "unreasonable") price discrimination insofar as the customer classifications do not reflect significant cost differences.

The rate structure rules that I would propose would *not* prohibit price discrimination per se; only inefficient price discrimination based on the *identity* of the user would not be permitted. A tapered rate structure, for example, could include a "volume discount" such that high-volume users would pay a unit price just equal to the marginal cost of usage. At intermediate levels of usage, the unit price could be designed to exceed slightly the marginal cost of an additional minute, message, or other measure of telecommunications output. To prevent "unreasonable" volume-based price discrimination, my rules would ban any tariff restriction prohibiting resale or shared use. Of course, in a world where the transactions costs of arbitrage are zero, a volume-based price discrimination plan may be unsustainable; low and intermediate users could simply pool their network access requirements to take advantage of the high-volume discount. But organizing and managing an arbitrage arrangement *is* costly, so there does exist some flexibility to incorporate some volume discounts in the rate structure.

"Universal Service" as a State Responsibility. Permitting local telephone companies and state PUCs to include volume-based price

discrimination in their local exchange access tariffs provides a source of revenue to finance below-cost network access for certain subscribers who might otherwise discontinue telephone subscribership if required to pay its full cost. This application of welfare-enhancing price discrimination could be combined with statewide pooling or rate averaging as appropriate to deal with the problem of "high cost" exchanges within a given state.[36] Subsidies *between* and *among* states, however, would be eliminated.

The state PUCs could, at their option, require that the uniform rate structure include subsidized access to the local exchange. The state PUCs would accept, however, the responsibility for establishing eligibility criteria for telephone subscribers who should receive subsidized access. Such criteria (if any) would mirror the economic conditions and political importance of subsidized access in each individual state. Some states may place great emphasis on widely-available telephone subscribership while others may not. If either statewide pooling or welfare-enhancing price discrimination is inadequate to assure a high level of statewide telephone subscribership, then state legislatures should be encouraged to subsidize telephone service to targeted user groups that satisfy state-determined eligibility requirements. Moreover, each state PUC should develop its own transition plan found necessary to ameliorate only undesired rate impacts on consumers as the FCC-prescribed rate structure rules become effective. Some states will find that no transition plan is necessary and could implement the FCC rules with minimal impact on subscribers. As a general rule, I believe that the issue of subsidized access to the telephone network is ultimately a *local* issue and federal telecommunications policy should reflect this view.

A state-specific view of "universal service" may seem both radical and antithetical to the purpose of the Communications Act of 1934 ". . . to make available, so far as possible, to all the people of the United State a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . .," but I do not believe it is. As I noted earlier, the concept of universal telephone service is not a well-defined social or economic objective mandated by the Communications Act of 1934. The Communications Act directs only that telephone service be provided at "reasonable charges." In my view, reasonable charges simply means "reasonable cost." Nowhere does the Act state that reasonable charges should be interpreted to require that local network

[36] Implementing jurisdictional subsidies through the separations mechanism typically focuses on subsidizing the *local exchange carrier* rather than the end user. However, the end user, *not* the carrier, is the proper target of public policy designed to maintain wide subscribership to telephone service. Neglecting this point may lead to protectionist policies toward local telephone companies rather than policies that will directly improve the economic welfare of end users.

access be provided *below* cost to some network subscribers. While a "network externalities" argument can be made that suggests that the private cost of network access may exceed its social cost and, therefore, an access subsidy may be good social policy for encouraging subscribership to a *new* or *developing* network, it does not follow that this economic argument mandates that one telecommunications service, say, interstate MTS, must subsidize another.[37] Indeed, a strict application of this economic argument would require the levy of a non-distorting tax and subsidy from the federal treasury, since the economic distortions introduced by inefficient pricing of telecommunications services used to finance the subsidy may lead to other economic distortions that *exceed* the social value of the access externalities.[38] Given the existing high level of nationwide telephone subscribership, I feel confident that this is precisely the case today, i.e., the social cost of the pricing distortions in the intercity transmission market probably exceeds the social value of the externalities of local exchange subscribership provided below cost.

While the Commission's ACP will begin to shift the source of local exchange subsidy from the price of interstate toll minutes to a carrier's-carrier charge, the concept of subsidized access to "high cost and rural areas" as a federal regulatory responsibility remains. I simply cannot accept the implicit logic of a regulatory policy that requires the ratepayers in New York state, for example, to subsidize telephone companies in Wyoming. Such federal regulatory policy is no different in my view from having the Federal Energy Regulatory Commission require electric power customers in Mississippi who enjoy relatively mild winters to subsidize the winter operating costs of electric power companies in Minnesota. If Congress, however, wants to provide *nationwide* subsidized access to the telephone network, it should do so explicitly and provide the necessary subsidy through general tax revenues. It should not simply impose a statutory requirement of subsidized network access to be funded by nationwide distortions in the pricing of telecommunications services.

Treating access to the telephone network as a state rather than federal regulatory responsibility would minimize and localize the distortions in network access pricing necessary to fund below-cost access. Both state regulators and the local telephone companies would be confronted with a binding constraint on the source of the

[37] A survey of some of the literature on the externalities of telephone service is provided by S. C. Littlechild, *Elements of Telecommunications Economics* (Stevenage, U. K.: Peter Peregrinus Ltd., 1979), Chapter 12.

[38] The National Telecommunications and Information Administration has estimated that telephone consumers in the aggregate would be better off economically by approximately $1.6 billion annually if local telephone rates fully recovered all NTS costs and MTS rates were permitted to fall following removal of local exchange NTS costs presently allocated to the interstate jurisdiction. See Comments of the National Telecommunications and Information Administration to the Federal-State Joint Board, CC Docket 80–286, Appendix D.

subsidy, viz., the difference between price and cost for intermediate volume users of network access. This constraint will force state regulators to take a hard—and perhaps uncomfortable—look at precisely *who* should receive subsidized local exchange access and on what terms. For example, should both telephone access *and* usage be subsidized? Should users with multiple access lines receive subsidized access for *each* access line or only the first? Should both the rich as well as the poor have the right to subscribe to subsidized "lifeline" service? So long as the subsidy continues to flow from the Universal Service Fund as prescribed by the FCC and funded by all connecting intercity carriers (or, more precisely, their customers), there will be no incentive at the local level for reducing dependence on this source of subsidy or reducing the cost of local exchange service in "high cost" areas. Moreover, there will be little incentive to target the receipt of subsidized access to users that each state PUC, legislature, or other local political body might find deserving of financial support.

It must be emphasized that major beneficiaries and proponents of the universal service shibboleth have been the regulated, local franchise monopoly telephone companies. As rate base regulated entities, local telephone companies have had a powerful incentive to invest in telephone plant when given favorable treatment by state and federal regulators. Moreover, the long-standing industry practice of flat rate pricing of local telephone service has encouraged uneconomic usage of local telephone service; has encouraged the growth of rate base by requiring the building of new plant to meet peak demand accentuated by flat-rate tariffs; and has provided inaccurate price signals regarding the cost of using local exchange facilities. The mandate of universal service has provided local telephone companies with a convenient and, for all practical purposes, a compelling political argument supporting the current status of jurisdictional separations and local monopoly supply of telephone service.

It is not clear to me that the concept of nationwide universal service that thrived in a monopoly telecommunications world will continue to be in the self-interest of local telephone companies as growing competition undermines the jurisdictional subsidy mechanism and technological changes make alternative local distribution networks increasingly cost-effective. If the local telephone companies cease to be a major constituency and beneficiaries of the universal service doctrine, then the political basis of universal service as a federal responsibility may narrow considerably in the future. Approaching universal service as a state rather than federal responsibility may, therefore, be an inevitable consequence of advancing technology and economic forces at work in the telephone industry rather than a discretionary shift in the direction of telecommunications policy.

Uneconomic Bypass of Local Exchange Facilities. A major consequence of non-cost based rates for intercity switched transmission services is the powerful economic incentive for large users to avoid payment of telecommunications rates that exceed cost. Both advancing technology and the FCC's open entry policies have made it possible for new intercity carriers and large private users to bypass both AT&T's long haul network and, more recently, local exchange facilities as well. Uneconomic bypass of telecommunications facilities is an inevitable consequence of non-cost based pricing and poses a serious threat to the economic viability of some local exchange carriers.

The threat of uneconomic local exchange bypass is by definition a local, regional, or statewide problem. Not all local telephone companies in the nation are or will be subject to the same bypass probability. Given the localized nature of the problem, the local exchange carriers and their state PUCs are uniquely qualified to assess the likelihood of bypass in their own service areas. Consequently, the local exchange carriers and the state PUCs should accept the responsibility for balancing the goals of statewide universal service and the potential for state-specific uneconomic bypass of local exchange facilities.

Approaching the pricing of network access from a unified, comprehensive perspective eliminates regulatory distinctions that cannot be sustained in a competitive environment, greatly simplifies the tariffing of network access, and recognizes the essential role of the states in resolving conflicting policy objectives. In short, my federalist approach recasts the problem of access charges as largely a state and local issue with the federal interest in interstate telecommunications competition protected by rate structure rules. Ultimately, both network subscribership and uneconomic bypass *are* a state and local concern, unlike the national defense which is clearly a federal responsibility. In my view, the federal interest can be maintained and protected by minimal federal intrusion in contrast to a complex web of rules that unnecessarily maintains a bifurcated jurisdictional responsibility for the pricing of network access.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON
re:
MTS AND WATS MARKET STRUCTURE

The Commission initiated this proceeding five years ago to determine whether the public interest requires that interstate toll telephone service (MTS/WATS) should be provided on a sole source basis, free from direct competition. 67 FCC 2d 757. Of course, the Commission realized that, should competition be permitted, it would have "to determine what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causational basis; what additional charges, if any, should be levied

on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services." *Id.* at 759. Having subsequently determined that unfettered competition will best serve the public interest,[1] the Commission must now decide these very difficult policy issues.

The cornerstone of any Commission action, and this one is no exception, is Section 1 of the Communications Act, 47 U.S.C. 151. Section 1 provides that the Commission shall "make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . ." Lest there be any confusion arising from the Order that elimination of discrimination between services is the overriding objective of this decision, it is not. The objective of this proceeding is to promote efficient communications service with adequate facilities at reasonable charges.

Nonetheless, the Commission has met conflicting objectives in this proceeding because promoting efficient communication service through cost-based rates could jeopardize the availability of adequate facilities to many households. The Commission has approached this apparent conflict by asserting, for the first time, that promoting "universal service" is one of the purposes of the Act. The Commission reaches this finding because it believes a dimunition of universal telephone service would impede the Commission in meeting its Section 1 mandate to make communication service available to all people of the United States and to ensure that safety of life and property is promoted through such service.

I am troubled by this finding. At the outset, I wish to make it clear that promoting universal service may be a laudable goal in Docket No. 78–72. However, the Commission has based its statutory finding, which appears to be a novel interpretation of an Act that is almost fifty years old, upon an insufficient analysis of the Communications Act and its legislative history, and prior Commission and judicial pronouncements in this area.[2] I am therefore not prepared to find, based on the present record, that promoting universal service is an

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[1] Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980), and Second Report and Order in CC Docket No. 78–72, FCC No. 82–515, released November 30, 1982.

[2] See, *e.g.*, Specialized Common Carrier Services, 31 FCC 2d 1106. I am also not persuaded by the record in this proceeding that safety of life and property would be jeopardized absent universal service. Nor is it immediately obvious from my own experience that this would be the case. For example, at a recent Regional Hearing in Portland which I chaired, my staff asked the Secretary-Treasurer of the Southern Montana Telephone Company what she felt the effect of disconnects would be on the safety of life and property. She responded, "Probably would be none." Transcript from May 6, 1982, Portland Hearing (Docket No. 80–286) at 139. She explained that while large ranchers in Montana may choose to disconnect some of the main stations which they currently utilize on their property if rates increase, their telephone service would only be reduced thereby, not terminated.

absolute goal of the Act. The Commission has also failed, in my estimation, to demonstrate any reason to establish universal service as a statutorily mandated goal which the Commission is obliged to meet. The purposes of Docket No. 78–72 could be achieved just as effectively, and without compromising other important goals, were the Commission simply to exercise its Section 1 authority.

This brings me to the source of my greatest concern over the universal service finding. It threatens to restrict, in this proceeding and in others, the flexibility the Commission retains and requires under its broad Section 1 mandate to achieve its overriding policy objective: the promotion of efficient service with adequate facilities at reasonable charges. I need only point out in this regard the conflict that may exist between a goal of universal service and efforts to encourage efficient service through increased competition. In pursuit of the latter policy, the Commission is now considering deregulating carriers which are non-dominant (*i.e.*, those which are constrained by the market from pricing their services above cost).[3] However, in high cost areas the cost-based rates of these carriers, that might otherwise be found to be non-dominant, could nonetheless be considered unaffordable to some customers. The universal service mandate could be interpreted in these circumstances as necessitating the continued regulation of these competitive carriers in order to avoid disconnects.[4] In sum, I believe that it is fully within the Commission's jurisdiction, and a valid communications policy, to promote universal service, provided it does not unduly infringe upon promoting efficient communication service at reasonable charges.

Having said this, the question becomes what access charge structure will promote efficient communications service at reasonable charges. To begin that analysis, it is essential to realize that the Commission is dealing with the problem of deciding the appropriate price of access to local bottleneck facilities. Control of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants.[5] The Commission previously has determined that all exchange telephone operators control bottleneck facilities.[6]

Given this setting, economic and legal precedent teaches us that

[3] See Further Notice of Proposed Rulemaking (Competitive Carrier Rulemaking), 84 FCC 2d 445 (1981).

[4] It is also unclear whether the statutory interpretation adopted in this order would impose on the Commission an obligation to ensure the development of universal service among new services, such as cellular radio and Digital Termination System (DTS).

[5] See *e.g.*, A.D. Neale, the Antitrust Laws of the United States of America: A Study of Competition Enforced by Law (1968).

[6] First Report and Order in Competitive Carrier Rulemaking, 85 FCC 2d 1 (1980).

cost-based rates would best serve to promote efficient service and thereby maximize consumer welfare.[7] Moreover, costs should be assigned to the cost causer in order for society to best utilize its resources.[8] Finally, cost-based access charges will serve to promote the optimal market structure for competition in both the interstate and international toll telecommunications markets.

In the telephone business, the revenue requirements for local exchange plant are divided between interstate and intrastate jurisdictions pursuant to the Commission's Separations Manual. Of course, this proceeding does not address the question of the appropriate jurisdictional separation of exchange plant. However, we at the Commission are extremely aware of the potential problems that may arise from disparate regulatory treatment of exchange access charges.[9] I personally am looking forward to reviewing the recommendations of the Joint Board, and the comments upon those recommendations, in the Commission's jurisdictional separations proceeding in Docket 80–286.

The present proceeding, however, looks only to the allocation of costs which are attributed to the interstate jurisdiction. These costs include both traffic sensitive (i.e., variable) and non-traffic sensitive (i.e., fixed) costs. The fundamental finding of this Report and Order is that non-traffic sensitive (NTS) costs ultimately must be recovered on a flat basis and that traffic sensitive cost must be recovered on a usage basis—with virtually all costs being recovered from the cost causers.[10] This approach promotes efficient communications services at reasonable prices.[11]

Unfortunately, the present pricing structure does not follow this

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[7] See *e.g.*, Alfred E. Kahn, The Economics of Regulation: Principles and Institutions (1970); and Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[8] See *e.g.*, J. Bonbright, Principles of Public Utilities Rates, 311–2 (1961).

[9] One immediate problem resulting from disparate interstate and intrastate access charges is the reporting and identification of toll minutes as either interstate or intrastate. However, perhaps even more disturbing than disparate regulatory policies is the potential for exchange carriers to discriminate between intra-LATA transport charges to toll carriers and direct charges to its subscribers for completion of intra-LATA toll calls. Such a scenario will be possible unless a uniform, coordinated regulatory approach is adopted for allocating exchange telecommunications revenue requirements. One guiding rule that state and federal regulators must keep in mind is that the carrier's rate structure should be transparent to the identity of the traffic that is being transported.

[10] One relatively minor exception in the Commission's plan in this regard is that NTS central office equipment will be recovered on a usage basis. The Commission concludes that, because NTS central office equipment is not dedicated to particular subscribers, it should be collected on the basis of usage. This particular conclusion and its rationale, in my opinion, is inapposite.

[11] For a discussion of the appropriate pricing methodology for recovering fixed and variable costs, see, for example, J. Hirshleifer, Price Theory and Applications, p. 355 (1980).

framework. Virtually all interstate costs, both traffic sensitive and non-traffic sensitive, are recovered on the basis of usage.[12] As such, the NTS costs are recovered inefficiently. I need not repeat here how such inefficiency can spur uneconomic bypass and hamper this economy's entry into the Information Age. However, in devising a plan to correct the current pricing anomalies, it is important to understand the magnitude of the problem we are dealing with. For example, in 1981, the annual interstate NTS revenue requirement was eight billion dollars, which is roughly equal to an average of $7 per access line per month.

In devising a plan to recover NTS costs on a flat basis, it is important to recognize that the Commission previously had addressed the regulatory treatment of both CPE and inside wiring in other proceedings. The interstate costs for CPE are smoothly being phased out over a five year transition pursuant to the Poponoe Plan. Therefore, it would be unnecessarily disruptive to impose these costs upon consumers in the form of flat subscriber charges because these flat charges would decrease as the costs were phased out. Similarly, in 1981 the Commission adopted a 10 year program for amortizing the capital costs associated with inside wiring. These costs essentially represent a one time expense as they are amortized, and therefore also will not be placed in a flat charge. With respect to the current expense attributable to inside wiring, the Commission must decide in Docket 79–105 whether to recoup these expenses on the basis of usage, switch to flat charges or deregulate entirely.

By excluding CPE and inside wiring from flat charge recovery, an average of only $4 per line per month in 1981 dollars must be recovered through flat charges. However, as depicted in Figure I, the distribution of costs on a study area basis is widely dispersed.[13] The numbers for some companies are so high as to suggest either a large number of disconnects if flat charges are imposed to recover NTS costs, or, in the extreme, the telephone operations will cease to exist.

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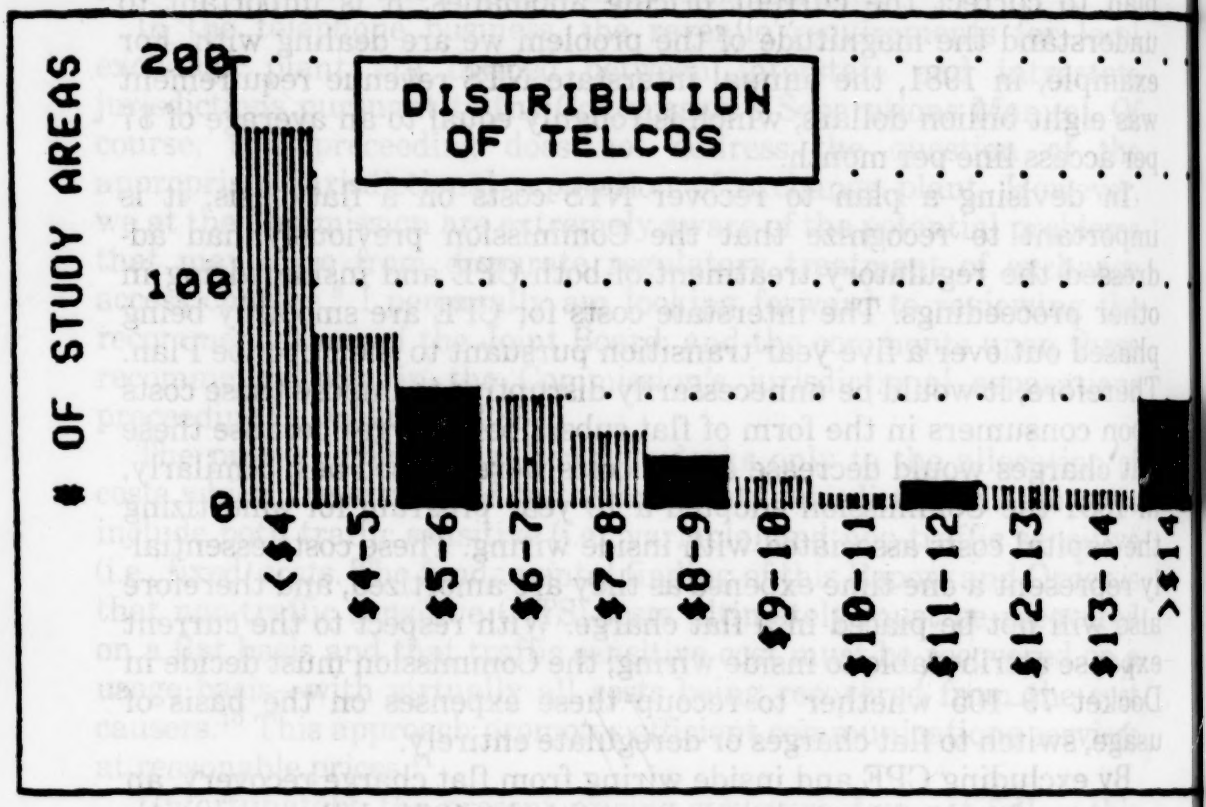
[12] The rate structure for interstate private line services does not follow the industry norm, but rather currently appears to follow generally accepted economic principles.

[13] Study areas generally coincide with state boundaries, with each individual company's costs being averaged or aggregated within the state. The estimates have been derived from data submitted in Docket No. 80–286. Observations have been reported for 506 study areas. In addition to these observations, there are roughly 800 average schedule companies that provide telephone service throughout the nation. However, the revenue requirements for these companies tend to be lower than average, and therefore the companies generally would not qualify for any subsidies.

Figure I.
DISTRIBUTION OF FLAT CHARGES BY STUDY AREA
(Excludes CPE and inside wiring but includes pay telephones and central office equipment)



The Commission has addressed this problem by adopting a Universal Service Fund to provide support to high cost areas. The magnitude of this fund will be determined by the Commission in Docket 80–286. However, this decision finds that the Universal Service Fund should be supported by access charges that are assessed upon interexchange carriers.

One approach to the problem of ensuring that adequate facilities are available, so far as possible, is to provide a subsidy to offset the costs which are deemed too high to be recovered through flat charges. Figure II specifies an estimate of the annual surcharge required to subsidize consumers at various rate levels. For example, if all households were to receive a subsidy for any costs above $6, the annual cost to society would be only $250 million.

Figure II.
STATISTICS REGARDING SUBSIDIES FOR HIGH COST AREAS
(assumes subsidy of all costs above specified dollar amount)
(access lines costs are computed for each company with the data used in Figure I)

MAXIMUM ACCESS CHARGE	ANNUAL SUBSIDY REQUIREMENT	ESTIMATE OF MONTHLY SURCHARGE PER LINE
$10.00	$ 63,500,000	$.06
9.00	70,000,000	.07
8.00	96,700,000	.08
7.00	152,000,000	.13
6.00	250,000,000	.22
5.00	410,000,000	.36
4.00	688,000,000	.60

As mentioned, the Commission has decided to recover the Universal Service Fund through usage sensitive charges assessed upon long distance communications carriers. However, these funds could be allocated directly from subscribers through flat charges as shown in Column 3. This approach may promote the public interest because the elasticity of demand is much less for "dial-tone" than for toll service. Therefore, there will be less of an output distortion if the surcharge is placed in the flat charge.[14] Another rationale for a flat surcharge may be that it will be clearly visible to all subscribers, carriers and regulators. Hence, it will not be subject to any large unforeseen growth, which has been the case with SPF. Because the Commission, to my knowledge, has not received any comment on which approach would better serve the public interest, I would hope it would maintain an open mind on this subject in Docket 80–286.

The remainder of the Commission's access charge plan is exceedingly complex. Additionally, the particular transition plan adopted by the Commission to implement its cost-based policies has not received public comment. Therefore, I would like to highlight what might be a few problems with the plan so that the carriers and the general public can carefully examine whether it is both workable and equitable.

First, the plan reallocates on January 1, 1984, $4 per line per month from the existing charges to interstate carriers for MTS/WATS services to direct charges to telephone subscribers by exchange carriers. Of this $4 per line, minimum flat charges of $2 to residences and $4 to businesses are mandated. The exchange carriers are given flexibility for recovering the $2 shortfall attributable to

[14] See, *e.g.*, R.A. Musgrave and P.B. Musgrave, Public Finance in Theory and Practice (1973).

residential households (i.e., $4 - $2). However, the business minimum charge cannot exceed 200% of the residential minimum charge, and no customer can be billed more than what the exchange carrier charges for dedicated facilities.

The major reason for this aspect of the plan is to give each carrier flexibility in recovering its NTS costs. Because economic circumstances vary throughout the country, the Commission believes that a standard nationwide plan would be appropriate. However, the flexibility afforded by the plan may turn out to be a double-edged sword. For example, the antitrust implications of an exchange carrier changing its pricing structure in the face of bypass are unclear. Similarly, it is unclear whether the $2 per line shortfall attributable to residential households can be accurately recovered in the first year due to unexpected shifts in demand caused by rate structure changes. For the most part, the Commission expects these costs to be recovered either on a price per call or a price per minute basis. However, the prices to large volume users will be capped at roughly $28 per line on average thereby requiring that revenues that are currently collected above the cap be recovered from another source. Since low volume users will make virtually no contribution, the bulk of the revenues will have to be derived from moderate users.

Another problem which highlights the difficulty the Commission will have in implementing its plan is that exchange carriers simply do not have the capability to determine which OCC customers have reached their maximum charge per line. Any attempt to rectify this problem will necessarily engender administrative and economic burdens. The Commission's discussion of having the exchange carriers either coordinate billing or establish surrogate charges for the OCCs only highlight the problems, but does not solve them.

The second major aspect of the plan is the method by which NTS costs are recovered from interstate services and carriers during the transition period. Currently, NTS costs are recovered from MTS/WATS services on a usage sensitive basis. AT&T pays about 7.2 cents per minute for premium interconnection and the OCCs pay about 3.3 cents per minute (at 4474 minutes per line) for standard line side interconnection. Private line services do not presently contribute to any common line NTS costs.

The Commission's access charge plan radically alters the relative NTS costs burden that these services share. Private line services that access the local exchange will, for the first time, contribute to NTS costs through a usage charge that is equivalent to that charged to MTS/WATS services. Additionally, the OCCs' contribution will be somewhat less than AT&T's because of the $1.4 billion premium access charge that is assessed to AT&T.

My greatest concern with this aspect of the Commission's access charge plan is that it leaps into the unknown. For example, we do not have any information on the effect that changing the cost

allocation for private lines will have on individual subscribers' overall telephone bills. Placing a surcharge above costs upon private line users may prove to be highly inequitable to some consumers, especially in light of the fact that this surcharge will be phased out by the end of the transition. Moreover, any additional revenues that are generated may produce only very small decreases in MTS/WATS bills.

Perhaps even more troubling is the lack of analytical vigor employed by the Commission in developing the $1.4 billion premium access charge. Of course we are all aware that the correct answer to the problem of access for toll service providers is equivalent interconnection at equivalent cost-based prices. We also know that, as long as one carrier receives a premium interconnection, estimating the value or opportunity cost for that interconnection for purposes of allocating NTS costs among carriers will be highly speculative. Nevertheless, given that this proceeding was initiated to determine the appropriate "MTS and WATS Market Structure," it is crucial for the Commission to maintain a competitive environment that is suitable for new entry until equal interconnection is afforded to all.

Unfortunately, I cannot be certain that this is the case under the Commission's access charge plan. While the Commission believes that the $1.4 billion premium access charge is substantial, this charge in reality is only about $56 million because AT&T would pay about 96 percent of these costs if there were no price differential between AT&T and the OCCs. There are several ways to view the economic effect of the Commission's premium access charge plan. For example, the OCCs currently contribute roughly 60 percent less per minute than AT&T to NTS plant. Under the new access charge plan, when including an accurately billed usage charge in the end user common line rate structure, OCC customers (except for the larger customers who are "capped") will pay about 25 percent less per minute (35 percent for "capped" customers) than AT&T's MTS/WATS customers for NTS plant. Stated another way, the Commission's access charge plan will have the effect of more than doubling the OCCs' current ENFIA charges, while at the same time reducing the cost of access to AT&T.

What effect these changes will have on the market structure for MTS and WATS is unclear at this time. However, I am certain the Commission will carefully review any evidence which suggests that this part of the access charge plan will impede the development of competition in the interstate and international public switched voice markets.

In conclusion, the Commission has taken the extremely important step of bringing its costing methodologies in line with a competitive market structure. The access charge plan will promote efficient communications by adopting a cost-based approach for ratemaking,

while at the same time provide subsidies to high cost areas that otherwise would be threatened with the loss of adequate facilities to many households. As such, the plan is fully in accord with the Communications Act. However, as described herein, there may be unknown problems with certain aspects of the transition plan. Because of the critical importance of this decision and its extraordinary complexity, the Commission, no doubt, will be asked to review several aspects of its decision. I will pay particular attention to those petitions that attempt to demonstrate that the transition plan is either unworkable or produces unnecessary transitional dislocations.

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

In re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase I (Access Charge)

I write separately to emphasize my concern that any access charge plan assure that universal service is maintained. Being from a state with a low population density, I am especially mindful of how necessary telephone communications are to the health and well-being of rural America. I am delighted that the Commission apparently shares my concerns.[1]

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[1] The Commission has adopted a plan that recognizes that the national interest is best served if universal service is maintained. This plan accomplishes this objective by:

- the contemplated *monitoring* program and commitment to take corrective action and to undertake a formal "*revisitation*" of this proceeding to ensure immediate, appropriate modifications should any unanticipated disruptive or deteriorating effects upon the nationwide telecommunications system or upon the continued maintenance of universal service develop (paras. 124, 195–196, 366–367);
- the establishment of the *Universal Service Fund*, enabling high cost companies to maintain affordable local exchange rates that do not substantially exceed rates charged by other companies, and selective mandatory *pooling* requirements (and voluntary participation in common tariff and revenue pool arrangements) to assure continuation of universal service in rural America and other high cost areas (paras. 134–135, 308–338):
- the provision for waivers to allow "*life line*" service (paras. 136–137);
- our recognition of possible justified *local deviations* from a single national plan requiring all dedicated end user costs be recovered through flat and equal charges on all customers (para. 367);
- a *transition* with a smooth and gradual, yet flexible, pace to allow a more "comfortable" adjustment to the new economic realities (para. 172);
- the allowed rate structure *flexibility* for the exchange carrier to implement the transition in a manner, within reason, to fit its individual situation and requirements (paras. 132, 175, 182, 185); and
- the careful balancing of conflicting objectives including the elimination of unlawful discrimination and preferences, and the promotion of competition, network economic and engineering efficiencies and, importantly, universal

No doubt should exist that the immediate, overriding policy concerns of the Commission for assurance of universal service and network preservation will set the future development and evolution of this plan.

SEPARATE STATEMENT OF COMMISSIONER STEPHEN A. SHARP

In the past, local telephone companies have been compensated in different ways when their plant has been used for the origination or termination of interstate or foreign communications. In general, local telephone companies receive the highest compensation when their plant is used in the provision of interstate MTS/WATS. The lowest rate of compensation is the so-called B-1 rate, which is the monthly rate, usually flat, that local telephone companies charge business customers for local exchange telephone service. Vast interstate private line networks have been created by connecting private lines to B-1 service in each area where the customer wishes to communicate; in some cases these networks rival the public switched telephone network in their coverage. Yet these networks pay only the B-1 rate for "access";[1] in part because the B-1 rate is in most instances considerably cheaper than the rate for access that is bundled into the cost of a MTS/WATS call,[2] the same telephone call often costs the customer less on a private line network than it does under MTS/WATS.

With the rise of competition, the other common carriers (OCCs) sought to utilize B-1 service for access. The established telephone industry naturally opposed this and sought to obtain compensation at the higher MTS/WATS rate. The result of this dispute was a compromise: the OCCs were charged the ENFIA rate for access,[3] which was higher than the B-1 rate but lower than that received by local telephone companies under MTS/WATS.[4]

The Commission seeks to resolve these rate disparities with a single federal access charge. While this is a laudable goal, I wish to point out that there are many services tariffed with the various states which can be and are being used for purposes of access. Some examples of these services are intrastate WATS and intrastate private line service. It is not always obvious or simple to determine

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service as mandated by Section 1 of the Communications Act (". . . to make available, so far as possible, to all the people of the United States a rapid efficient. Nation-wide. . .communications service with adequate

[1] The term "access" is used henceforth to denote the use of a local telephone company's plant for the origination and termination of interstate and foreign communication.

[2] AT&T has estimated that the rate for access in an MTS/WATS call is approximately 7¢ per minute in each local exchange.

[3] As the Commission has recognized, ENFIA service is local exchange (i.e., B-1) service at a rate different from that on file with local jurisdictions for that service. *See* AT&T, 89 FCC 2d 1000, 1001 n. 4 (1982).

[4] *See* ENFIA, 71 FCC 2d 440 (1979).

whether these services, tariffed with the states, are in fact being used for interstate and foreign communications. And to the extent that these services are priced lower than the federal access charge, users will attempt to substitute the former for the latter.[5]

If *all* rates including those tariffed with the states, were based upon the cost of providing the respective service, it would not be necessary to establish a federal access charge since users would be free to use *any* service, whether tariffed with this Commission or the states, for interstate or intrastate communications as they saw fit. Carriers would remain financially whole regardless of differences in the way the same service is *used*. There would be no incentives on the part of customers to substitute one service for another because of non-cost based rate disparities, and no need for either the Commission or the telephone companies to police the use to which various services were put in order to make the federal access charge workable.[6]

We know that local exchange service can be employed practically to interconnect any two points within that local calling area, including points at which access to interstate and intrastate toll can be obtained. In the long run, it appears neither reasonable nor practical to maintain differences in rates for the same service depending on the use to which local exchange service is put i.e., for interstate and foreign communication, intrastate toll communication, or local exchange communication.

It is true that different jurisdictions, in seeking to implement their own policies, may see fit to use different ratemaking approaches which can result in different charges for similar or identical products. From a practical point of view, however, as distinctions between jurisdictionally interstate and jurisdictionally intrastate communications become increasingly blurred and resale becomes more widespread, the desirability of cost-based local exchange rates for each local area will become increasingly apparent. In this way, users of telephone service will pay the same rates regardless of how they use their local service, thereby discouraging uneconomic bypass and eliminating opportunities for arbitrage based upon differing rates for the same service or services.

I hope that the Commission will keep this long term solution in

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[5] In page 20 of Appendix F of the order, for example, the Commission notes that in its 1981 Annual Report, Aeronautical Radio, Inc., a large user of communications services, stated that it had replaced federally tariffed private lines in its private line intercity network with cheaper private lines obtained under state tariffs.

[6] If users were free to substitute other, cheaper services for the federal access charge, they would have no incentive to obtain service under federal access tariffs. Under these circumstances, either the Commission or the telephone companies would have to police how substitutable services were being used in order to prevent avoidance of the federal access charge.

mind when it revisits and reviews the progress in implementing access charges.

Administrative Finality
CATV Carriage, Mandatory Signals
CATV, Violation Commission Orders
Forfeiture Mitigation, Request for Denied
Reconsideration, Petition for Denial of

Petition for reconsideration and request for forfeiture mitigation denied. Commission's rules and Communications Act did not operate to toll carriage requirements beyond time originally found.
–*Quincy Cable TV, Inc.*

FCC 83–60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
QUINCY CABLE TV, INC.	CSR-1678 WA0295
Quincy, Washington	
Petition for Reconsideration	

MEMORANDUM OPINION AND ORDER

(Adopted: February 9, 1983 Released: February 17, 1983)

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT.

Introduction

1. On April 28, 1980, the Chief of the Cable Television Bureau, pursuant to delegated authority, denied a petition for waiver of the cable television mandatory broadcast signal carriage rules (Section 76.57 of the Commission's Rules) filed by Quincy Cable TV, Inc. (hereinafter "Quincy"), of Quincy, Washington.[1] Quincy thereafter did not comply with the rules but filed petitions for stay and for reconsideration,[2] and subsequently for review by the full Commission. The Commission affirmed the decisions of the Bureau Chief and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating

[1] *In re Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter "*Quincy I*"].

[2] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter "*Quincy II*"]; *In re Quincy Cable TV, Inc.* (Quincy, Washington) (adopted September 2, 1981) [hereinafter "*Quincy III*"].

that the filing of stay, reconsideration, and waiver petitions does not automatically stay the effect of a decision taken under delegated authority.[3]

2. Now pending are a series of pleadings relating to this, including: (1) letters dated May 14, 1982, and May 25, 1982, to Chairman Fowler;[4] (2) Quincy's "Petition for Reconsideration"; and (3) oppositions from KHQ, Incorporated (hereinafter "KHQ-TV"); from King Broadcasting Company (hereinafter "KREM-TV"); and from Spokane Television, Inc. (hereinafter "KXLY-TV"), who are, respectively, the licensees of Stations KHQ-TV (NBC, Channel 6), KREM-TV (CBS, Channel 2), and KXLY-TV (ABC, Channel 4), all Spokane, Washington; and (4) Quincy's reply thereto.

3. Although Quincy reiterates and continues certain arguments concerning the validity of the mandatory signal carriage rules themselves,[5] and relating to the denial of its waiver petition, Quincy is now essentially seeking reconsideration of that part of the decision relating to its apparent liability for failure to carry the signals in question after initial denial of its petition. Although the Notice of Apparent Liability referred to KHQ-TV and KREM-TV, it and the *Quincy II* decision should have referred to KHQ-TV and KXLY-TV, both of which Quincy admitted to not carrying. Although it might be inferred that KREM-TV was also not carried, this is not in evidence. Quincy has not argued that this provides any ground for change in the forfeiture proposed, and we do not believe any change is in order since the forfeiture was not based on the particular identity of the signals involved. The essential question here is whether the effectiveness of the Bureau Chief's decision was stayed by the filing of various subsequent pleadings so that no violation could be said to have occurred.

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[3] *Quincy Cable TV, Inc.* (Quincy, Washington), FCC 82–193, 89 FCC 2d 1128 (1982) [hereinafter *"Quincy IV"*].

[4] KREM-TV and KXLY-TV each filed a "Motion to Strike" Quincy's May 14, 1982, letter on, respectively, May 17 and May 18, 1982. These motions will be denied. While arguably irregular, we cannot say that the filing of Quincy's May 1982 letters has prejudiced any party to this proceeding.

[5] In a "Motion for Expedited Determination" filed July 8, 1982, Quincy raises an additional constitutional challenge to the mandatory signal carriage rules, claiming that they constitute an unlawful taking of private property in contravention of the fifth amendment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). We note, however, that the Court continues to distinguish between permanent physical occupations of property, which constitute takings, and ". . . appropriate restrictions upon an owner's *use* of his property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. at 3179, which do not. *See also Black Hills Video Corporation v. FCC*, 399 F.2d 65 (8th Cir. 1968).

Summary of Pleadings

4. Prior to filing of the instant reconsideration petition, Quincy filed a letter to the Chairman of the Commission on May 14, 1982.[6] In this letter, Quincy contends that the language of Section 76.7(g) of the Rules, which allows a timely filing of, *inter alia*, a petition for waiver of Section 76.57(a) of the Rules to toll the requirements of that rule ". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings," clearly demonstrates that Quincy's progressive filings for stay pending further review have continuously tolled Quincy's obligations to carry the Spokane signals. Quincy asserts that any finding that it has been in violation of Section 76.57(a) of the Rules as early as May 2, 1980, renders Section 76.7(g) of the Rules a nullity. Quincy reiterates its contention that Section 408 of the Communications Act prohibited the Bureau Chief from imposing a ten-day compliance requirement on Quincy in *Quincy II*. Quincy claims that the questions it has raised in these proceedings have been novel, and should not have been decided on delegated authority. Quincy argues that it should not be subject to forfeiture liability in the face of Bureau and Commission silence on Quincy's stay requests. Citing Section 1.108 of the Rules, Quincy suggests that the Commission might on its own motion set aside *Quincy IV*.[7]

5. On May 25, 1982, Quincy filed another letter to the Chairman. In this letter, Quincy contends that its argument that it is not obligated to carry the Spokane signals is supported by the Administrative Procedure Act (hereinafter "APA"), particularly Sections 551(8), 551(9), and 558(c) of the APA, referring to agency licensing procedures, which Quincy asserts include the Commission's signal

[6] The letter was served on all Commissioners; the General Counsel; the Chief of the Cable Television Bureau; and counsels for KHQ-TV, KREM-TV, and KXLY-TV.

[7] Quincy commented on KREM-TV's and KXLY-TV's motions to strike its letter on May 20, 1982, contending that its letter was procedurally proper. Quincy claims that its letter only addressed the question of the $5,000 forfeiture, which Quincy characterizes as inequitable and unwarranted. Quincy argues that while former Section 74.1109(h) of the Rules referred to "interlocutory" questions of temporary relief pending further "procedures," the fact that its successor Section 76.7(g) of the Rules did not use the term "interlocutory" and uses the term "proceedings" means that Section 76.7(g) of the Rules allows for stays of signal carriage obligations at least until a final decision subject to judicial review is handed down by the Commission. KREM-TV and KXLY-TV each replied to Quincy's comments on, respectively, May 21, and May 25, 1982. Both KREM-TV and KXLY-TV state that the proper procedure for requesting mitigation or remission of a forfeiture is set forth in Section 1.80(f)(3) of the Rules. On June 11, 1982, Quincy responded to the notice of apparent liability, requesting that action on the notice be held in abeyance pending Commission action on the instant "Petition for Reconsideration." However, upon examination of the thrust of Quincy's arguments on reconsideration, we will herein address the question of Quincy's forfeiture liability, rather than postpone consideration thereof as Quincy requests. *See* Section 1.80(f)(3) of the Rules.

registration and carriage rules for cable television systems. Quincy claims that, pursuant to Section 558(c) of the APA, the automatic stay provisions of Section 76.7(g) of the Rules, triggered by Quincy on November 27, 1979, may not be terminated until the Commission issues its final determination in this proceeding.

6. In support of its "Petition for Reconsideration," filed June 4, 1982, Quincy reiterates its prior arguments concerning the automatic stay provisions of Section 76.7(g) of the Rules, Section 408 of the Communications Act, and Sections 551 and 558 of the APA.[8] Quincy further argues that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as a final or an effective order. In addition, Quincy now contends that none of the Spokane stations can assert mandatory carriage rights on Quincy's system. Section 76.57 of the Rules permits such rights to be asserted by a " . . . relevant licensee . . . . " According to Quincy, this does not include the Spokane licensees, whose signals, Quincy claims, neither serve nor reach Quincy, Washington. Quincy asserts that the only over-the-air service available to its community is from the translators which rebroadcast the Spokane signals. These translators are licensed to Quincy Valley TV Inc. (hereinafter "Quincy Valley"), which has never requested carriage of its signals. Quincy further argues that Section 312 of the Communications Act requires certain procedures before the Commission may find violation of a rule or regulation, which were not afforded prior to the issuance of *Quincy II* or *Quincy IV*. Quincy challenges the summary disposition of its argument concerning Section 408 of the Communications Act in *Quincy IV* at n. 11, and maintains that the ten-day compliance order of *Quincy II* " . . . is illegal and of no effect."

7. KHQ-TV filed its opposition on June 17, 1982. Initially, KHQ-TV argues that Quincy's petition is procedurally defective, as it alleges no new facts or changed circumstances concerning the signal carriage at issue, and is more properly directed to the notice of apparent liability insofar as it challenges the forfeiture authorized in *Quincy IV*. KHQ-TV contends that Sections 1.102(b)(1), 1.102(b)(3), and 1.115(h)(2) of the Rules clearly indicate that issuance of a stay of an action taken by delegated authority is discretionary on the part of the Commission, and that the Commission in its discretion herein decided not to issue a stay. Accordingly, maintains KHQ-TV, Quincy was obligated to comply with the order of *Quincy II*. KHQ-TV further contends that at this date, Quincy's argument based on Section 408 of the Communications Act has become moot by the passage of time.[9] With regard to Quincy's argument concerning the automatic stay,

[8] Quincy also argues that the automatic stay represents an "exemption" within the meaning of Section 551(8) of the APA.

[9] KHQ-TV notes that Quincy apparently resumed carriage of KHQ-TV on June 3, 1982. *See also* note 10, *infra*.

KHQ-TV argues that were this argument to be accepted, "it would jeopardize the Commission's entire temporary authorization and waiver granting process." In any event, asserts KHQ-TV, *Quincy II* denied any continuance of temporary relief, terminating the automatic stay. KHQ-TV maintains that its status as a significantly viewed signal in Grant County makes it a relevant licensee to assert carriage rights, pursuant to Section 76.57(a)(4) of the Rules, as the Commission noted in *Quincy IV* at 1128–1129 n. 1.

8. KREM-TV opposed Quincy's petition on June 17, 1982. KREM-TV notes that it is entitled to be carried on Quincy's system, pursuant to Section 76.57(a)(4) of the Rules. In addition, citing *Friendly Broadcasting Co.* (Cleveland Heights, Ohio), FCC 62–670, 23 RR 2d 893, 897 (1962), KREM-TV contends that the Commission's forfeiture sanctions are separate and distinct from those authorized by Section 312 of the Communications Act. KREM-TV argues that the Commission's forfeiture sanctions are authorized by Sections 501 and 503 of the Communications Act and Section 558(b) of the APA, and characterizes the automatic stay provisions of Section 76.7(g) of the Rules not as a "license" but as "relief" within the meaning of Section 551(11)(c) of the APA. Finally, KREM-TV notes that Quincy was not assessed a forfeiture until after it had been given a chance to comply with *Quincy II* and failed to do so.

9. KXLY-TV opposed Quincy's petition on June 17, 1982. KXLY-TV again argues that Quincy's May 14, 1982 letter should be stricken, as should Quincy's May 25, 1982 letter. KXLY-TV characterizes Quincy's "Petition for Reconsideration" as repetitive, and ". . . limited to . . . strained legalistic contentions. . . ." KXLY-TV asserts that Quincy has misrepresented facts concerning its signal complement from the inception of this proceeding, in the face of which the $5,000 forfeiture imposed is justified. KXLY-TV states that it is the relevant licensee and party-in-interest to request carriage as the Quincy Valley translators rebroadcast the Spokane signals only with their consent. Finally, KXLY-TV contends that Section 312 of the Communications Act is not applicable to Quincy because it is not a broadcast licensee.

10. Quincy filed its "Reply to Oppositions" on June 23, 1982. Quincy claims that neither Commission nor Bureau orders are self-effectuating, even on thirty days' notice, and reiterates its first amendment arguments. In addition, Quincy asserts that, pursuant to Section 704 of the APA, *Quincy II* was inoperative pending review by the Commission, or was subject immediately to judicial review. Absent these safeguards, Quincy maintains, first amendment rights and freedoms would be intolerably deferred. Quincy reiterates its prior arguments challenging the Commission's application of Section 1.102 of the Rules, by which the Commission in *Quincy IV* found *Quincy II* to have been final and effective on release, and contends

that Section 1.102 of the Rules is in conflict with Section 408 of the Communications Act.[10]

Discussion

11. To avoid controversy, and to expedite and narrow the issues in this proceeding, the Notice of Apparent Liability was issued only for rule violations commencing on or after May 18, 1981. In the Bureau Chief's *Quincy II* decision, Quincy was ordered to resume carriage of the signals in question within ten days; *i.e.*, by August 28, 1981. Quincy now argues that this order should not have been issued without the type of hearing described in Section 312(c) of the Communications Act[11] first having been held, and also that, pursuant to Section 408 of the Communications Act,[12] no order should have specified an effective date less than 30 days from service of it on Quincy. Since the forfeiture notice issued was for violation of the rules and not an *Order* of the Commission and since it was for violations continuing more than 30 days after service of the *Memorandum Opinion and Order* denying Quincy's waiver request (*Quincy II*), a resolution of both of these arguments in favor of Quincy would not result in any change in the outcome of this proceeding. We need not therefore address in detail Quincy's arguments. We would note, however, that Congress recently amended Section 408 to provide explicit authority for the Commission to make orders effective on less than 30 days' public notice. *See* H. R. Rep. No. 97–765, 97th Cong., 2d Sess. 58 (1982).[13]

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[10] On July 8, 1982, Quincy filed a "Motion for Expedited Determination." Quincy initially states that it has complied with *Quincy IV*, having ". . . commenced carriage of those Spokane, Washington broadcast station signals, via translators, to the preclusion of other programming of its choice, on June 3, 1982." Quincy again contends that *Quincy II* was not a final nor effective decision, citing, *inter alia*, S. Rep. No. 576, 87th Cong., 1st Sess. 7 (1961), and Sections 5(d)(3) and 5(d)(4) of the Communications Act.

[11] Section 312(c) of the Communications Act states, in pertinent part:

> Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein.

[12] Section 408 of the Communications Act states, in pertinent part: "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect with such reasonable time, not less than thirty days after service of the order. . . ."

[13] We note, with respect to Quincy's arguments concerning Section 312 of the Communications Act, that this section is manifestly not meant to

12. The second argument raised relates to compliance with the requirements of the APA. Section 558(c) of the APA specifies that if a proper application for a new license or for renewal of a license is on file, the existing license "does not expire until the application has finally been determined by the agency." This provision is urged to be relevant in the present context because "license" is a defined term in Section 551(8) of the APA, which includes "statutory exemption or other form of permission." If the exemption from the mandatory signal carriage rules provided Quincy during the pendency of its waiver application is an APA "license" then arguably that license continues in force past the time of the Bureau Chief's decision until the matter is finally determined by the agency. If this were the case, no rule violation could be said to have occurred. However, Section 551(8) of the APA, in defining the term "license," does not refer to exemptions in general, but only to "statutory exemption[s]" as well as other traditionally understood forms of "permission" or "registration." A request such as Quincy's *not* to carry signals required by law is not included in this definition. It is Section 551(11) of the APA which refers to "exemption[s]," as well as other actions beneficial to persons upon application therefor, defining such actions and exemptions as "relief," apart from the APA's concept of licenses and licensing procedures.[14]

13. A third argument made is that specific provisions of the Commission's Rules provide Quincy with protection from having to comply with the mandatory carriage rules until such time as the administrative processes relating to its waiver petition are complete. Seection 76.7(g) of the Rules provides that if a waiver petition is timely filed, a cable system "need not carry the signal of the requesting station pending the Commission's Ruling on the petition or on the question of temporary relief pending further proceedings." Quincy interprets this to mean that, so long as a request for stay or a petition of some type remains pending, compliance is automatically excused.

14. This is a misinterpretation of the import of Section 76.7(g) of the Rules. This rule had its genesis in former Section 74.1109(h) of the Rules, which allowed the timely filing of an appropriate petition for waiver to stay a carriage requirement ". . . pending the Commission's ruling on the petition or on the interlocutory question

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circumscribe forfeiture proceedings instituted pursuant to Section 503 of the Communications Act, which are of a separate and distinct nature. *American Cable Television, Inc.* (Fountain Hills, Arizona), FCC 81–555, 88 FCC 2d 593, 604 (1981); *Star Stations of Indiana, Inc., et al.*, FCC 71–365, 28 FCC 2d 691, 692 (1971); *Friendly Broadcasting Co.*, 23 RR 2d at 897. *Cf. Midwest Television, Inc. (KFMB-TV), et al.*, FCC 66–683, 4 FCC 2d 612, 622–623 (1966) (Section 312 does not circumscribe temporary relief provisions of waiver rules).

[14] Moreover, we note that Section 558(c) of the APA specifically refers to ". . . a license required by law," which does not contemplate a request *not* to carry signals otherwise required by rule or law.

of temporary relief pending further procedures." The further procedures referred to, however, were only those supplementary to the standard written submissions at the inception of a waiver proceeding, in those few cases in which written submissions alone were insufficient to resolve the pending matter. *Second Report and Order in Docket Nos. 14895, 15233, and 15971*, FCC 66–220, 2 FCC 2d 725, 764–766 (1966). *See also Memorandum Opinion and Order in Docket No. 15971*, FCC 66–354, 3 FCC 2d 400, 401–402 (1966). This is echoed in the current rules, in Section 76.7(f) of the Rules, which states in pertinent part: "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party *pending the hearing* and the nature of any such temporary relief." (emphasis added). In proceedings involving questions of television broadcast signal carriage, however, the evidentiary hearings required by the 1966 cable television rules were found to be unnecessarily burdensome, and were eliminated in 1968. *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 148 (1972); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, FCC 68–1176, 15 FCC 2d 417, 432–434 (1968). Nevertheless, the Commission stated that it had ". . . retained special relief rules." *Cable Television Report and Order*, 36 FCC 2d at 186, in this instance Section 76.7(g) of the Rules, allowing for an automatic stay of carriage requirements ". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings." The actual change in language was, apart from conforming editorial changes to new rule numbers, to delete the word "interlocutory" from the rule, and to substitute the word "proceedings" for "procedures." However, we do not agree that successive filings of requests for stay will prolong indefinitely the automatic stay of Section 76.7(g) of the Rules. Such an effect was not contemplated nor intended by former Sections 74.1109(f) and 74.1109(h) of the Rules. Indeed, in view of the Commission's desire to avoid burdensome special relief proceedings, we do not read Section 76.7(g) as allowing an automatic stay beyond the time that the Commission (or its designated authority) acts on an initial petition for relief. Accordingly, while Quincy's timely filed petition for waiver in 1979 stayed Quincy's carriage obligations vis-a-vis the affected stations, this automatic stay expired upon the resolution of *Quincy I*.

15. While Quincy argues that Section 704 of the APA either rendered the Bureau Chief's decisions in *Quincy I* and *Quincy II* inoperative pending review by the full Commission, or subjected them immediately to judicial review, we disagree. Section 704 of the APA states, in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final *for the purposes of this section* whether or

> not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule *and* provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §704 (1977) (emphasis added). While Section 5(d)(7) of the Communications Act and Section 1.115(k) of the Rules make the filing of an application for review a condition precedent to judicial review of delegated actions, neither Sections 5(d)(3) nor 5(d)(4) of the Communications Act grants an automatic stay on such a filing. In fact, Section 1.102(b) of the Rules states that stays of delegated actions are discretionary.[15] Nor do we feel that our existing procedures for rehearing constitute either a prior restraint or an intolerable deferral of access to review in contravention of the first amendment, which would be impermissible under, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[16] Finally, nothing in Quincy's numerous arguments gives us any justification for a mitigation of the $5,000 dollar forfeiture.[17]

In view of the foregoing, we find that grant of Quincy's petition is not in the public interest.

Accordingly, IT IS ORDERED, That the "Motion to Strike" filed May 17, 1982, by King Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Strike" filed May 18, 1982, by Spokane Television, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed June 4, 1982, by Quincy Cable TV, Inc. IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, That Quincy Cable TV, Inc. FORFEIT to the United States the sum of five thousand dollars ($5,000) for willful or repeated violation of Section 76.57(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal

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[15] *See also* Section 705 of the APA, Section 405 of the Communications Act, and Section 1.106(n) of the Rules, setting forth *the* discretionary nature of stays on the part of an agency.

[16] With regard to Quincy's contention that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as an effective or final order, we do not read the APA so rigidly, nor have the courts. *See, e.g., FTC v. Standard Oil Co. of California*, 101 S.Ct. 488, 493 (1980). *Cf. Bucks County Cable TV, Inc. U.S.*, 299 F.Supp. 1325, 1334 (E.D. Pa. 1969), *rev'd on other grounds*, 427 F.2d 438 (3d. Cir. 1970), *cert. denied*, 400 U.S. 831 (1970) (automatic stay constitutes final action).

[17] We also note an erroneous reference to an obligation on Quincy's part to carry the signal of Station KALB-TV (NBC, Channel 5), Alexandria, Louisiana, in *Quincy II* at 66. This was an editorial error, and is rescinded.

Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of this Memorandum Opinion and Order, the case will be referred to the Department of Justice for collection, pursuant to Section 504(a) of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order shall be sent by Certified Mail — Return Receipt Requested to Quincy Cable TV, Inc.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: Petition for Reconsideration filed June 4, 1982, by Quincy Cable TV, Inc.

When this case first came before the Commission on April 22, 1982, I reluctantly concurred in affirmance of the Bureau Chief's denial of the relief requested by Quincy Cable. On reconsideration, I have concluded that Quincy should be granted that relief.

In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps must as a matter of law, rest with Quincy Cable.

Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest that any of the stations target any of their programming to Quincy.

Quincy Cable insists that it is constitutionally entitled to use its limited channels to provide its customers with programming of its and their choice brought in from Seattle and elsewhere. I believe it may be correct.

In its April 22, 1982, Memorandum Opinion and Order, the Commission answered Quincy Cable's constitutional arguments in part by asserting that in footnote 16 to its decision in *Midwest Video II* the U.S. Supreme Court "distinguished the mandatory signal carriage rule [from the access rules in question in that case] and reconfirmed their validity." 89 F.C.C. 2d 1135. It seems to me,

though, that read in context, that footnote does nothing more than distinguish these rules.

If we are to infer law from footnotes, I believe that for purposes of the present case footnote 19, in *Midwest Video II* is more significant than footnote 16. In footnote 19, the Supreme Court noted the opinion by Chief Judge Markey for the U.S. Court of Appeals for the Eighth Circuit in that case and said:

> "The Court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forego comment on these issues as well." 440 U.S. 709

Footnote 19 seems a virtual invitation by the court for a proper case in which to consider the constitutional arguments pressed so insistently by Quincy Cable in this one. Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

I therefore respectfully dissent.

Political Broadcasting, Reasonable Access Rule
Political Candidate, Federal Candidate, Reasonable Access

Petitions to issue Notice of Inquiry for overall renewal/revocation approach to implement Section 312(a)(7) denied. Section 312(a)(7) of Communications Act (reasonable access) requires affirmative right of access to use of broadcast facilities by candidates for federal office.
–Renewal/Revocation Approach

FCC 83–47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Adoption of an overall renewal/revocation approach to implementation of 47 USC §312(a)(7)	RM-3821

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983; Released: February 8, 1983)

BY THE COMMISSION:

1. The Commission has before it petitions filed by the National Telecommunications and Information Administration (NTIA) and Henry Geller which seek the issuance of a Notice of Inquiry concerning the Commission's implementation of Section 312(a)(7) of the Communications Act of 1934, as amended.[1] Comments were submitted by the National Citizens Committee for Broadcasting (NCCB), and the American Broadcasting Companies, Inc. (ABC).[2]

2. NTIA's petition urges the Commission to abandon its case-by-

[1] Section 312(a)(7) provides:

(a) The Commission may revoke any station license or construction permit—

(7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

On September 17, 1981, the Commission recommended to Congress that it repeal Section 312(a)(7), as well as Section 315 and the Fairness Doctrine. In this connection, we will continue to enforce these laws as long as they remain in effect.

[2] NTIA's petition was filed by its then director, Mr. Henry Geller, on December 11, 1980. NCCB's comments were filed February 13, 1981. ABC's comments were filed February 26, 1981. Mr. Geller filed his "Petition to Issue Notice of Inquiry" on September 8, 1981. It was filed subsequent to the U.S. Supreme Court's decision in

case approach to reasonable access determinations because such a procedure is inconsistent with the language of the statute, its legislative history and sound administrative policy. In this regard, NTIA suggests that the Commission adopt an approach of determining whether a station or network failed to afford reasonable access on an "overall" basis at either renewal time or upon institution of a revocation proceeding for willful or repeated violations.

3. With respect to the language of Section 312(a)(7), NTIA believes that the Commission has inappropriately proceeded on the basis that a licensee shall grant each federal candidate's request for use of a station's facilities unless such requests are deemed unreasonable, and that the Commission has the authority to review any specific denials to determine whether a licensee acted in an arbitrary fashion and, in effect, failed to afford reasonable access. NTIA argues that Congress chose its language (i.e., willful or repeated failure to allow reasonable access) because "it recognized the clear inappropriateness of proceeding case-by-case." NTIA contends that Congress imposed a reasonable access requirement, desiring the licensee to be held "broadly accountable" to avoid "interference with day-to-day editorial decisions." NTIA asserts that if Congress wanted the Commission to review each request on a case-by-case basis, it would have drafted a statute reflecting this intention. In this connection, NTIA maintains the absence of such language indicates that Congress deliberately avoided such scrutiny by the Commission.

4. NTIA urges that this overall approach reflects the congressional goal for the Commission, consistent with its oversight of the public interest standard, to "judge whether a licensee's overall performance indicates a sustained, good faith effort to meet the public interest in being reasonably informed concerning federal races."

5. NTIA contends that the legislative history of Section 312(a)(7) further supports its interpretation. In this regard, NTIA states that, although there is no extensive discussion of the specific language of the reasonable access provision, the overall approach is appropriate in light of congressionally stated goals to give candidates for public office greater access to the media to inform the voters more fully and completely. NTIA states that of equal importance is the fact that nothing in the legislative history indicates congressional intention for the Commission not to give the language and scheme its plain meaning; that is, that "the licensee is to afford *reasonable* access to use and the Commission is to enforce this obligation by revoking (or denying renewal) for willful or repeated failure to meet this obligation."[3] NTIA concludes that "Congress thus imposed a new

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the *Carter/Mondale* case (see note 4, *infra*). At the time of the latter filing, Mr. Geller was director of the Washington Center for Public Policy, but he has indicated that the views expressed are his own.

[3] In this regard, NTIA cites the following passage in the Senate Reports:

obligation for [f]ederal offices *but explicitly charged the Commission to continue with its existing enforcement policy of examining the obligation at renewal.*" (Emphasis added by NTIA.)

6. NTIA states that in addition to the plain language of the statute and its legislative history, sound policy compels the overall approach. In this respect, NTIA contrasts administration of the equal opportunities provision under Section 315(a) and the reasonable access provision. It states that in applying equal opportunities obligations, "the Commission can simply determine whether a candidate has been allowed to use the station; if so, equal opportunity follows in a rather mechanical objective fashion." Accordingly, NTIA states, "Clearly, individual case-by-case rulings are called for and are perfectly feasible." However, NTIA states that in "'reasonable access' situations, if the Commission proceeds to determine in each case whether the licensee's action in refusing a request is 'reasonable,' it is in a deep quagmire." In this context, NTIA believes that "[c]oncern with the individual action involves a deep intrusion into the day-to-day broadcast editorial decisions and the highly subjective process of review of a candidate's needs versus the station's judgment of those needs and its own needs."

7. NTIA suggests that by reviewing reasonable access performance on an overall basis, the Commission need not fear that the statutory purpose will be thwarted. In this connection, NTIA states

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Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a legally qualified candidate for [f]ederal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.

The duty of broadcast licensees *generally* to permit the use of their facilities by legally qualified candidates *for these public offices* is inherent in the requirement that licensees serve the needs and interests of the committees [sic] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).* [S. Rep. No. 382, 92nd Cong., 1st Sess. 34 (1971); emphasis added by NTIA.]

Furthermore, NTIA states that "all doubt is settled by the discussion at page 28 of the [Senate] Report. After describing the 'lowest unit charge' provisions of Section 315, the Report states . . . ":

The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC *should continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license.* Certainly no diminution in the extent of such programming should result from the enactment of this legislation.

In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation [candidates for federal office], S. 382 contains an express provision [Section 101(c)] to this effect. [Emphasis added by NTIA.]

that since "[l]icensees remain under a clear obligation to afford reasonable access, at the risk of losing their franchises, . . . [they] are most unlikely to act in derogation of that obligation." In the "unusual or rare case" that either complaints or its own investigation indicates "willful or repeated violations, the Commission can act promptly by instituting revocation proceedings, and, before the end of the campaign, can also proceed to obtain immediate relief." Further, NTIA states the Commission can utilize a reporting procedure for determining after any particular election whether "reasonable compliance has been achieved." Additionally, NTIA believes the Commission can continue to provide guidance to both licensees and candidates, and, if necessary, issue policy statements. NTIA contends that these procedures are sufficient to satisfy the goals intended by Congress and do not bring into possible jeopardy a broadcaster's license because so long as "it has acted reasonably on an overall basis, its renewal is assured."

8. NTIA indicates its approach is more in line with the First Amendment. In this respect, it cites *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973), in which the Court stated that "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty." NTIA adds that the Commission itself has acknowledged in previous rulings that it is engaged in precisely such balancing.

Comments

9. The NCCB has filed an opposition to NTIA's petition. NCCB states the Commission has previously considered and rejected the same "'overall' approach" regarding the Fairness Doctrine based in large part on its belief that the public would otherwise be deprived of timely debate on controversial public issues. NCCB contends that because questions concerning reasonable access are in the political arena, the need for timely review is of critical significance since it "could mean the difference between victory and defeat for a particular candidate." Furthermore, rather than implementing congressional intent, NCCB believes that, contrary to NTIA's assertions, the plain language and legislative history of Section 312(a)(7) mandates the complaint procedures implemented by the Commission. NCCB contends that by deferring review until license renewal time or, as NTIA has stated, upon instituting revocation proceedings, the congressional goal of affording candidates greater media access would be severely undermined by the inability to act expeditiously. Further, NCCB asserts that "[a]lthough Congress authorized license revocation for Section 312(a)(7) violations, lesser included penalties have not been ruled out."

10. NCCB asserts that the consistent case-by-case approach implemented by the Commission should be deferred to because "[t]he

construction of a statute by those charged with its administration 'should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.'" (Citations omitted.) *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *CBS v. Democratic National Committee*, 412 U.S. at 121. NCCB adds that nothing in the present scheme eliminates the potential for implementing the most severe penalty of denying renewal or revoking a license. The Commission's approach merely allows for timely determinations when necessary to prevent the thwarting of Congress' goals in enacting Section 312(a)(7).

11. NCCB asserts that in addition to being inconsistent with the plain language of Section 312(a)(7) and its legislative history, NTIA's overall approach is inconsistent with the First Amendment. In this regard, NCCB cites *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976), in which the Court stated:

> [I]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

NCCB believes that this clearly illustrates that under the First Amendment people are entitled to hear discussion of political issues "before election day" and clearly candidates are entitled to communicate their positions "before the votes have been tallied." Without the case-by-case implementation, argues NCCB, the immediate consideration of specific situations needed to guarantee what Congress and the Courts intend would not be possible.

12. NCCB agrees that the overall approach suggested would "have the advantage of escaping the 'heated political climate' during an election campaign," but it asserts that it is this very climate which makes immediate consideration so critical. NCCB states that "only during the campaigns, not afterwards, can the Commission insure that the outcome of the election is an accurate reflection of the collective decisions of an informed public." In addition, NCCB notes that Section 315(a), the equal opportunities provision, creates a right of reply in favor of a candidate's opponents, and thereby mitigates any effect of "non-neutrality." In sum, NCCB believes that "NTIA has failed to advance any compelling reasons for altering [the Commission's present] practice" of considering Section 312(a)(7) matters on a case-by-case basis.

13. ABC's filing contains no substantive comment due to its involvement as a party to the *Carter/Mondale* [4] litigation which was pending before the Supreme Court at the time of its submission. ABC

[4] *Carter/Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979), *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub nom. CBS v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

suggests that interested parties be afforded an opportunity to participate after the Supreme Court rules.

14. As noted above, Mr. Geller's petition was submitted subsequent to the Supreme Court's decision in *Carter/Mondale*. *See supra* note 2. With respect to the Court's decision which, *inter alia*, upheld the Commission's case-by-case approach, Geller states that: "Significantly, the Court's holding does not rule on the main point of the NTIA petition — that as a matter of sound policy, the Commission should implement [S]ection 312(a)(7) on an overall basis—either at renewal or by revocation." Thus, he argues, the Commission still has the discretion to adopt the overall implementation policy suggested by NTIA, "if it finds that it would better serve the public interest."

15. Geller urges the Commission to adopt a procedure whereby it would intervene when it appears a "licensee is acting willfully (i.e., in bad faith) . . . or repeatedly to violate the reasonable access provision." Geller suggests that, additionally, the Commission should continue to afford guidance through general inquiry or rulemaking as it has in the past, "and by issuing declaratory rulings *at the request of the broadcaster, but not the candidate*." (Emphasis added by Geller.) Geller contends that this approach reflects two prior Supreme Court decisions: *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *CBS v. Democratic National Committee*, 412 U.S. 94 (1973), because each requires "breathing space" for the licensee's day-to-day editorial judgment.

16. Geller also asserts that consistent with the Commission's present goal of creating and fostering broadcast diversity, "there should obviously be a 'letting go' process as to the existing system. . . ." In this context, Geller asserts that our case-by-case policy "constitutes the old Commission attitude of 'business as usual,' with a government agency deeply involved in individual judgments best left to licensee editorial decisions."

Discussion

17. Having fully considered the petitions and the comments, we remain convinced that our case-by-case implementation of reasonable access under Section 312(a)(7) is contemplated by the statute and is consistent with congressional legislative intent and sound Commission policy. Moreover, we believe that the Supreme Court's recent decision in review of *Carter/Mondale* clearly supports this determination.

18. In accordance with the statute and congressional intent to foster the communication of ideas in the federal political arena, we adopted a case-by-case approach to implement Section 312(a)(7) in order to insure that the candidate, and ultimately the electorate, would benefit in a timely fashion from the intent of the reasonable access provision. Unless we maintain a posture of acting upon individual complaints, even where a licensee's actions may not be

willful, the timely resolution of disputes would be impossible. Furthermore, there is no indication in the legislative history that Congress intended to limit Commission action to overall review at renewal or upon revocation proceedings. The language which NTIA excerpts from Section 312(a)(7)'s legislative history, *see supra* note 3, and which it claims settles "all doubt," refers only to a licensee's obligations "in connection with the renewal of . . . [its] broadcast license." If Congress intended only the "overall" review at renewal time suggested by NTIA and Mr. Geller, it would not have placed the statute in the revocation section of the Act, since revocation is a procedure used *during* a license term. By prescribing revocation Congress demonstrated its intention for timely Commission enforcement of the reasonable access provision. In addition, it seems plain that the language in the legislative history concerning renewal and revocation merely refers to ultimate sanctions that might be imposed by the Commission and does not suggest that Congress intended these to be the exclusive administrative remedies. Finally, our administrative approach to the political arena has consistently been predicated upon the desirability of timely Commission review. In this connection, we cannot perceive how the public interest would be served if candidates for public office were denied access and the Commission took action only months or years after the election.

19. Congress has indicated that the purpose of the Federal Election Campaign Act (FECA), of which Section 312(a)(7) was a part, is:

> . . . to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters. [117 Cong. Rec. 28792 (1971).] We believe that these stated goals would be frustrated if individual complaints concerning denial of reasonable access could not be reviewed by the Commission to determine if, in fact, a broadcaster is in compliance. By deferring consideration as suggested by NTIA it would be impossible to protect both the candidate and the people to whom each candidate needs to communicate.

20. We also emphasize that the Commission, in an effort to clarify its regulatory role with respect to reasonable access, issued in 1978 a Notice of Inquiry concerning its policy in enforcing Section 312(a)(7) and afforded interested parties an opportunity to comment on the full range of our administration of the statute.[5] No commenting party recommended that the Commission stop its practice of reviewing reasonable access complaints on a case-by-case basis. Further, nothing contained in the comments led the Commission to conclude that its policy of reviewing reasonable access matters

[5] *In re Commission Policy in Enforcing Section 312(a)(7)*, 68 FCC 2d 1079 (1978).

through the individual complaint process should be modified or changed.

21. Since the enactment of Section 312(a)(7) the Commission has implemented a policy of reviewing reasonable access complaints to determine if a broadcaster has complied in a specific situation. In every instance, the Commission's policy, with respect to the broadcaster, has been and continues to be deference to the good faith determinations of its licensees. In this way we believe the day-to-day editorial judgments of licensees are protected insofar as possible. Nothing in the language of this provision or in its legislative history suggests that any other course is required. Furthermore, in light of the Commission's recent "deregulation" rule changes, specifically with respect to renewal periods, the case-by-case policy is even more appropriate. If, as NTIA and Geller suggest, the Commission were to adopt an overall approach to reasonable access, the new seven-year renewal period for radio and the five-year renewal period for television could further damage the purpose behind the reasonable access provision. For instance, four general elections involving federal candidates could be held before the Commission might consider the access afforded by a radio station, and as many as three such elections with respect to television. It is not likely that Congress intended this potential result.

22. Both NTIA and Geller express concern with "intrusion" into the day-to-day judgments of licensees. However, the reasonable access provision requires timely oversight by the Commission, which in certain cases cannot be satisfactorially implemented by delaying consideration until renewal time. It should be noted with respect to petitioner's concern with potential intrusion that we become involved in individual controversies as little as possible by encouraging negotiation between complainants and individual broadcasters. Most complaints are resolved by such negotiation. Thus, the "intrusion" which NTIA and Mr. Geller are most concerned with is not characteristic of the Commission's implementation. In addition, without the benefit of Commission input on an individualized basis, the broadcaster might be inhibited in its reasonable access judgments because of a lack of guidance from the Commission during particular campaign situations. Mr. Geller's suggestion that this problem could be remedied by permitting the broadcaster but not the candidate to seek guidance is inconsistent with the clear intent of Congress that reasonable access be afforded on an individual basis to federal candidates.

23. NCCB, in its opposition to NTIA's petition cited *Red Lion* and *CBS v. Democratic National Committee* for the proposition that the Commission's construction of the statute "'should be followed unless there are compelling indications that it is wrong, [and] especially when Congress has refused to alter the administrative construction.'" (citations omitted.) Further weight is given this

principle in *United States v. Rutherford*, 442 U.S. 544, 554 (1979), in which the Court, in referring to *Red Lion*, 395 U.S. at 381, stated that "[s]uch deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."

24. The recent decision by the Supreme Court in *Carter/Mondale* which affirmed the Commission's ruling adds specific judicial acceptance of the Commission's implementation of Section 312(a)(7). *See supra* note 4. *Carter/Mondale* began with an October 1979 complaint from the Carter/Mondale Presidential Committee stating that the three major television networks had denied reasonable access to President Carter in violation of Section 312(a)(7). The Carter/Mondale Committee indicated that it had attempted to purchase one prime time 30-minute program slot for early December 1979, and was unreasonably refused.

25. On November 20, 1979, the Commission found each network had acted unreasonably and directed them to advise the Commission by November 26, 1979, of their intentions regarding compliance with Section 312(a)(7). In reaching this decision, the Commission evaluated whether the campaign had begun for purposes of Section 312(a)(7) by considering the positions of both the candidate and the broadcaster as well as an abundance of objective indicia. Based on its evaluation, the Commission found that the only reasonable conclusion was that the campaign was in full swing and that the networks' policies amounted to the type of arbitrary blanket ban that had been previously deemed to be unreasonable.

26. The networks sought Commission reconsideration of this ruling which was denied. The Court of Appeals affirmed the Commission's decision describing the access created by 312(a)(7) as an affirmative right of access for candidates seeking federal elective office. The Court rejected the networks' assertion that Section 312(a)(7) was merely intended to codify prior Commission practice[6] and found that it was intended to create a new right of access for *individual* candidates for federal office. The Court of Appeals also expressed approval of the procedures and standards that the Commission had designed to implement the statute and concluded that, as so implemented, Section 312(a)(7) does not unconstitutionally intrude upon broadcasters' editorial discretion.

27. In affirming, the Supreme Court made a number of statements which are relevant to the instant petition. The Court stated:

[6] Prior to 1972, the Commission, under the public interest standard, had required that some time be made available for political broadcasts. However, no individual candidate had a right to buy time. Instead, the broadcaster was left with considerable discretion to determine what political programming to present based on its reasonable, good faith judgment about the importance and interest in particular races.

> The Federal Communications Commission is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and the Commission is responsible for implementing and enforcing §312(a)(7) of the Communications Act. Accordingly, its construction of the statute is entitled to judicial deference "unless there are compelling indications that it is wrong . . .." *Red Lion Broadcasting Co. v. FCC, supra*, at 381. As we held in *CBS v. Democratic National Committee, supra*, at 120, the Commission must be allowed to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." Like the Court of Appeals, we cannot say that the Commission's standards are arbitrary and capricious or at odds with the language and purposes of §312(a)(7). See 5 U.S.C. §706(2)(A). *Indeed, we are satisfied that the Commission's action represents a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith.* [*Id.* at 390, (emphasis added.)]

28. Furthermore, there is no question that the Court considered the Commission's case-by case policy for implementing reasonable access. In this connection, the Court stated:

> As it did here, the Commission, with the approval of broadcasters, engages in case-by-case adjudication of Section 312(a)(7) complaints rather than awaiting license renewal proceedings. See Tr. of Oral Arg. 11–16. Although the penalty provided by Section 312(a)(7) is license revocation, petitioners simply were directed to inform the Commission of how they intended to meet their statutory obligations . . .. In essence, the Commission entered a declaratory order that petitioners' responses to the Carter-Mondate Presidential Committee constituted a denial of "reasonable access." Such a ruling *favors broadcasters by allowing an opportunity for curative action before their conduct is found to be "willful or repeated"* and subject to the imposition of sanctions. [*Id.* at 394 n. 15; (emphasis added).]

29. With respect to NTIA and Mr. Geller's contention that overall review is consistent with the public interest standard, the following statement by the Court is pertinent.

> It is clear on the face of the statute that Congress did not prescribe merely a general duty to afford some measure of political programming, which the public interest obligation of broadcasters already provided for. *Rather, §312(a)(7) focuses on the individual "legally qualified candidate" seeking air time to advocate "his candidacy," and guarantees him "reasonable access" enforceable by specific governmental sanction.* [*Id.* at 377–78; (emphasis added).]

It is quite apparent from the above passages that, contrary to Mr.

Geller's arguments, the Court did consider our case-by-case approach and concluded that the Commission's implementation has been consistent with the intent of Congress.

Conclusion

30. The Commission's case-by-case implementation of Section 312(a)(7) follows the statute and Congressional intent. In the ten years since Section 312(a)(7) became law, Congress and the Courts have approved our method of enforcement and have not seen fit to alter the administrative scheme. We believe that the case-by-case approach is consistent with the public interest because, unlike the "overall" approach, it helps to assure that the electorate is adequately informed prior to individual elections. Case-by-case review does not in any way diminish our ability to review a licensee's compliance on an overall basis at renewal or to initiate revocation for willful violations. Furthermore, in 1978 we offered interested parties an opportunity to comment on our reasonable access enforcement. The difference between 1978 and today is the fact that the Supreme Court has now recognized the appropriateness of our policies.

31. Accordingly, the petitions of NTIA and Henry Geller to issue a Notice of Inquiry urging an overall renewal/revocation approach to the implementation of Section 312(a)(7) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Application, for Review, See Also Review
Review by Commission

Section 1.115(e)(3) of the Rules revised to state that applications for review of hearing designation orders issued under delegated authority shall be deferred until applications for review of final Review Board Decision in case are filed, unless the ALJ certifies the matter to the Commission.
–Revision of Sec. 1.115(e)(3)

FCC 83–90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revision of

Section 1.115 (e) (3) of the Commission's Rules and Regulations, Applications for Review of Hearing Designation Orders Issued under Delegated Authority

ORDER

(Adopted: March 3, 1983; Released: March 14, 1983)

BY THE COMMISSION:

1. The Commission has determined that the prompt and orderly conduct of its adjudicatory proceedings necessitates a change in Section 1.115(e)(3) of our Rules and Regulations to provide that applications for review of hearing designation orders issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. The revised rule permits the presiding Administrative Law Judge to certify an application for review of a designation order to the Commission if the Judge determines that the application for review involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. In addition, the revised rule provides that the Commission may refuse to entertain an application for review so certified and direct that objections to the hearing designation order should be deferred and raised when applications for review of the final Review Board Decisions are filed.[1]

[1] *Cf.* 28 U.S.C. 1292(b), which provides United States Courts of Appeals with

2. Authority for this revision of our Rules and Regulations is contained in Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended.[2] Because this revision relates to a matter of procedure, the procedural and effective date provisions of Section 4 of the Administrative Procedure Act[3] are not applicable.

3. ACCORDINGLY, IT IS ORDERED, That on the date that this Order is published in the Federal Register, Section 1.115(e)(3) of the Commission's Rules and Regulations IS REVISED as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

In Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations, Section 1.115(e)(3) is revised to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * * * *

(e)(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when applications for review of the final Review Board Decision are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

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authority to entertain appeals of certain interlocutory orders when the district judge states that an order, not otherwise appealable, involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

[2] 47 U.S.C. 154 (i) and (j) and 303 (r).

[3] 5 U.S.C. 553.

Suburban Community 307(b) Issue
Suburban Community-FM Station

Report and Order adopted eliminating the suburban community policy, used in licensing AM stations, and its FM corollary, the *Berwick* doctrine. Henceforth, the Commission will presume that compliance with rules pertaining to service to community of license will indicate an applicant's intent to serve that community and not a nearby central city.
–*Suburban Community Policy*
BC Docket No. 82–320

FCC 83–81

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of The Suburban Community Policy, the *Berwick* Doctrine, and the *De Facto* Reallocation Policy	BC Docket 82–320

REPORT AND ORDER

(Adopted: February 17, 1983 Released: March 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP DISSENTING IN PART AND ISSUING A STATEMENT.

Introduction

1. Before the Commission is the *Notice of Proposed Rulemaking*, 47 Fed. Reg. 29282, published July 1, 1982 and the comments filed in response to that *Notice*. In the *Notice*, the Commission sought comment on whether the public interest requires the continuation of three policies used in the licensing of radio and television stations. The policies, adopted to aid the Commission in fulfilling its responsibilities under § 307(b) of the Communications Act, 47 U.S.C. § 307(b), are the suburban community policy, used in authorizing AM radio, and the *Berwick* doctrine and the *de facto* reallocation policy, used in authorizing FM radio and television stations. We have reviewed carefully the comments filed in this proceeding. The comments indicate that the policies frequently are used for anticompetitive purposes. Commenting parties also contend that the policies have frustrated rather than furthered the goals of § 307(b) by inhibiting

the establishment of stations in small communities located nearby larger ones. Consequently, based on our analysis of the comments and for the reasons that follow, we believe that the mandate of § 307(b) can be fulfilled without reliance on these policies which, we conclude, no longer serve the public interest and should be eliminated. We emphasize, however, that elimination of these policies will not eliminate or modify § 307(b) of the Communications Act. Our obligation to implement that statutory responsibility continues and will be faithfully carried out.

Background

2. The *Notice* set out Commission responsibilities under § 307(b) of the Communications Act. Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Prior to the Radio Act of 1927, radio licensees generally were free to locate their radio stations in any preferred location subject to the then-existing minimal limitations against electrical interference. The result was "an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago, 40 stations; of New York, 38; of Philadelphia, 22; and of San Francisco, 22." 67 Cong. Rec. 5479 (1926) (remarks of Representative White). To dilute this concentration of radio stations in and around large cities, Congress enacted Section 9 of the Radio Act of 1927, which provided, *inter alia*, that

> the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operations, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

Pub. L. No. 69–632, ch. 169, § 9, 44 Stat. 1166. By this statutory provision, Congress authorized the newly created Federal Radio Commission "in passing upon a license to consider its proposed location and the area to be served" and directed the Commission to "effect an equitable geographical distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926).

3. Unsuccessful efforts were made to include in Section 9 language requiring the Commission to consider "the right of each state to have allocated to it" a certain quota of frequencies. 68 Cong. Rec. 2557 (1927). However, the following year, a compromise amendment to Section 9 was enacted which directed the Commission to allocate frequencies among five zones, each composed of several states. The frequencies were to be allocated in accordance with a formula based on population. Pub. L. No. 70–195, 45 Stat. 373. In 1934, Congress reenacted Section 9, as amended, into the Communications Act, as Section 307(b). Two years later, in 1936, Congress deleted the five-zone scheme, which had proved to be mechanistic

and unsatisfactory. This restored the original language of Section 9 of the Radio Act of 1927. Pub. L. No. 74–652, 49 Stat. 1475, 47 U.S.C. § 307(b). Thus, the legislative intent behind the original Section 9 of the Radio Act is still controlling today; namely, to effect an equitable geographical distribution of stations across the entire nation.

4. The Commission implemented § 307(b) in commercial FM radio and TV by establishing and incorporating in its rules a Table of Assignments for each service.[1] These tables provide for a distribution of channels to specific communities throughout the United States based, in part, on fixed mileage separations. The Commission determined that

> effectuation of the distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307(b)) . . . can best be achieved by the adoption of a Table of Assignments. . . .

Sixth Report and Order on Television Allocations, 41 FCC 148, 151 (1952). The licensing procedure for FM and television is a two-step process. Step one fulfills the § 307(b) obligation by making available for licensing only a frequency which has been assigned to a specific community on the Table of Assignments. If the applicant is desirous of utilizing the frequency in another community, he or she must petition for a rulemaking to amend the Table of Assignments. In step two of the licensing procedure, applications are processed in order to ascertain that the applicants have the requisite qualifications to be licensees of the Commission. If there is more than one applicant for a frequency, a comparative hearing takes place in order to determine the party most worthy of the grant. The *Notice* explained that Commission rules permit a station to be located within 15 miles (TV or Class B/C FM) or 10 miles (Class A FM)[2] of the community listed in the Tables.[3] If multiple applicants apply for a single frequency within the 15-mile or 10-mile limit, and these applications propose different communities of license, then a second § 307(b) determination is made during the comparative hearing.

5. In contrast, AM radio frequencies are allocated on a demand

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[1] *See, Sixth Report and Order on Television Allocations*, 41 FCC 148, 151–153 (1952). *Revision of FM Broadcast Rules*, 40 FCC 747, 757 (1963). 47 C.F.R. § 73.202 contains the FM Radio Table of Assignments and 47 C.F.R. § 73.606 contains the Television Table of Assignments.

[2] A Class A FM station is designed to render service to a relatively small community, city, or town, and the surrounding rural area. A Class B FM station is designed to render service to a sizeable community, city, or town, or to the principal city or cities of an urbanized area, and to the surrounding area. A Class C FM station is designed to render service to a community, city, or town, and large surrounding area.

[3] The 10- and 15-mile rule for FM is found at 47 C.F.R. §§ 73.203(b) of the rules. The 15-mile rule for TV is found at 47 C.F.R. § 73.607(b).

basis, with an applicant requesting the desired community and providing engineering exhibits to show the absence of harmful interference to existing stations. Section 307(b) considerations are made during the one-step proceeding to process the construction permit application. A hearing can result if petitions to deny are filed raising substantial and material questions of fact or if there are mutually exclusive applications.

6. Objectives and priorities guide the Commission's § 307(b) determinations. These set up preferences for applicants proposing to establish a station in an underserved community or in a community lacking broadcast service. Because the preferences are based on § 307(b) considerations, they can be conclusive in a mutually exclusive licensing contest.[4] The Commission feared that preferences could create incentives for applicants to try to prevail on the § 307(b) issue by designating as the community of license an underserved community proximate to a larger, more lucrative community, which was the intended recipient of the service. Thus, in an attempt to determine which community an applicant actually *intended* to serve, the Commission created the policies that are under study in this proceeding.

7. The suburban community-central city setting presented the Commission with its first occasion to test intent. Designation of a suburban community without a local transmission service could garner an applicant a § 307(b) preference while, at the same time, permitting coverage of the larger metropolitan community, not favored under § 307(b). Out of this situation, the suburban community policy was promulgated. The *Notice* stated that the suburban community policy, adopted in 1965 and modified in 1975 to apply principally in hearings involving mutually exclusive license applicants, is applicable where

> the applicant's proposed 5 mV/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community . . . a presumption will arise that the applicant realistically proposed to serve that larger community rather than its specified community.

Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 193 (1965) ("*Suburban Community*"). Related to this is the *Berwick* Doctrine, which applies the public interest considerations underlying the AM suburban community policy to FM radio and television, but without benefit of the presumption. *Berwick Broadcasting Corp.*, 12 FCC 2d (Rev. Bd. 1968); 20 FCC 2d 393 (1969); *sub. nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (Rev. Bd. 1973). *De facto* reallocation is

[4] *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 348 (1955).

> [a]n attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community, thereby depriving the assigned community of service from that channel.

Hall Broadcasting Co., Inc., 71 FCC 2d 235, 237 (1979).

8. The *Notice* explained that the instant rulemaking proceeding was prompted, in part, by a remand of *Communications Investment Corporation* v. *FCC*, 641 F.2d 954 (1981) ("CIC"), by the United States Court of Appeals for the District of Columbia. In that case, the Court reviewed two actions of the Commission granting construction permits for two FM[5] radio stations in Utah. The *CIC* court said that the Commission had failed to follow its own and court precedent in authorizing, without a hearing, a transmitter location that objectors claimed constituted *de facto* reallocation of two class C FM stations from their city of license to a larger community. The court derived from the precedents nine factors[6] for determining when an evidentiary hearing is required on *de facto* reallocation and *Berwick* doctrine issues before a transmitter location can be approved. The court, however, invited our review of the policies. Based on that invitation and on our continuing evaluation of the relevancy of all our rules and policies in furthering the public interest, we undertook this rulemaking proceeding.

9. The *Notice* sought comment on whether the policies under review herein continue to be necessary in implementing §307(b) in light of the extensive dispersion of radio and television services throughout the United States. The *Notice* also expressed concern that the policies may impose unwarranted costs on the public and the parties involved in licensing new or improved service. This occurs, according to the *Notice*, when allegations that a proposed facility will not serve its designated community are made, not in furtherance of a fair, efficient, and equitable distribution of service, but in order to delay or to impede the authorization of new service and new competition, most often in smaller communities. We asked

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[5] *D & B Broadcasting Co., Inc.*, 67 FCC 2d 570, *reconsid. denied*, 67 FCC 2d 1116 (1978); *Ben Lomond Broadcasting Co.*, 68 FCC 2d 1331 (1978).

[6] The nine factors are: the ratio of the population of the city of license to that of the larger city; the ratio of the distance between the proposed site and the city of license to the distance between the site and the larger community; the ratio of the signal strength in the city of license to the signal strength in the larger city; a loss area in the city of license or surrounding areas; whether the proposed site is already in use by larger city stations; whether the station is commonly owned with an AM station in the larger city and plans to share programming, staff or facilities with it; whether the station has evinced a prior intent to locate in the larger city; whether the station proposes to move its studio to the larger city; and whether there is a unique advantage to the site proposed.

comment on whether the benefits to be derived from the policies warrant the costs involved.

10. The *Notice* also sought comment on whether the term "community" should be redefined for §307(b) purposes in application processing to mean, not the specified community, but the metropolitan area effectively covered by the signal of the proposed station. Utilization of such a definition, said the *Notice*, would remove the comparative preference for designating as the community of license an underserved suburb while proposing power sufficient to cover a metropolitan area. The final item on which we sought comment was an implementation scheme in the event that the policies were deleted.

Comments

11. Comments were filed by parties representing two main interests: those generally concerned about the policies in question and those with matters pending before the Commission involving the policies.[7] One theme enunciated by commenting parties favoring retention of the policies centered on the Commission's responsibility to challenge, as stated by Seven Parties,[8] "disingenuous" applications. These were defined as construction permit applications specifying, as the community of license, a small community that is nearby a large or metropolitan community the applicant actually intends to serve. In a similar vein, Dempsey and Koplovitz said that, if the policies were removed, the Commission "will be plagued with questions of good faith, (and) undisclosed motivation for service to the larger more lucrative market," as long as an advantage can be earned under §307(b). Chatterbox, Inc. and Commanche Broadcasting, Inc. warn that "the evils sought to be averted by the policies still exist."

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[7] *See* Appendix A for a list of the commenting parties. On August 6, 1982, Southern Minnesota Broadcasting Co., Antares Broadcasting Co., and four FM applicants commenting jointly, Beaufort County Broadcasting Co., Dutchess Communications Corp., Carson Valley Broadcasting Company, and Jack A. Carpenter ("Beaufort"), requested the Commission to accept late filed comments. Because the filings were only one day late and in the interest of developing a full record in this proceeding, the comments have been accepted and considered. In similar fashion, "Beaufort" filed reply comments one day late, which, for the same reasons, will be accepted. On September 9, 1982, Channel 287, Inc., requested leave to respond to the reply comments of Mid-States Broadcasting, Inc. Because this unauthorized filing refers to a specific application pending before the Commission and otherwise raises no new or significant issues relevant in this rulemaking, it is denied. Denton Channel Two Foundation, Inc. filed a Motion to Strike portions of the reply comments of Public Communications Foundation for North Texas who, on October 6, 1982, filed an opposition. Because the Motion to Strike refers to matters pending in a restricted adjudicative proceeding, the Motion to Strike is granted.

[8] Joint comments filed by: Alegria I. Inc., Alegria, II, Inc., Alegria III, Inc., Big Time Radio, Inc., the Orange County Broadcasting Corporation, Santa Maria Radio, Inc., and Sonrisa, Inc. ("Seven Parties").

12. Parties favoring deletion of the policies generally agreed with Ben Lomond[9] who stated that the policies "are relics of an earlier age when there was a paucity of local transmission services." Atlantic Broadcasting Corporation expressed a similar conviction: "[A]lthough the policies may have served legitimate public policy concerns years ago, they have outlived their usefulness and, in fact, may actually undermine the policies underlying §307(b)." Gordon & Healy Chartered, declaring that the policies have denied local facilities to suburban American communities, submitted that, "It makes no sense in 1982 to view such current proposals [for new service] in light of American social structure of 1965 when the Suburban Community Policy was first adopted."

13. The comments presented divergent views on the benefits smaller communities, the intended beneficiaries under §307(b), have reaped from these policies. Buena Vista Telecasters of Texas, Inc., Chatterbox and Edward O. Fritts stated that elimination of the policies will hurt smaller communities because stations licensed to those communities will direct service to nearby larger areas and ignore the needs of the smaller communities. Ward & Mendelsohn, P.C., believes that the suburban community policy, or a suitable replacement, is necessary to "prevent abuse, but that significant communities which merit their own local outlet (due to a reasonable population benchmark) should not lose their valid §307(b) interests merely because they are located near a still larger community." Atlantic states that tastes and interests of persons living in large and small communities proximate to each other are not so divergent that service to one precludes service to another. Buena Vista, although urging retention of the policies, notes that "the frequencies for which applications are pending, or for which no applications have yet been filed, tend to be those available for suburban or outlying communities." Arch Communications commented that "hindrance of competition, hearing costs and delays, the realization of §307(b) objectives through past allocation decisions and the existence of other rules and policies to assure that licensees will direct their service to their specified communities of license" are persuasive reasons for abolishing the policies.

14. Eight different parties[10] focused on the 10- and 15-mile rules as a solution to the *Berwick* doctrine. Because the Tables of

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[9] Joint comments of Ben Lomond Broadcasting Company, KDAB, Inc., and Wasatch Broadcasting Partnership ("Ben Lomond").

[10] The parties are: ABC, Inc.; Joint Comments of Beaufort County Broadcasting Co., Dutchess Communications Corp., Copper Valley Broadcasting Co., Jack A. Carpenter ("Beaufort"); Dempsey and Koplovitz; Gordon & Healy; Joint Reply Comments of Arcatel, Inc., Lockhart Omni Communications, Inc., Cen-tex Broadcasting Corporation, Texas Professional Communications, Inc., and Lockhart Radio, Inc. ("Lockhart"); Ward and Mendelsohn; McKenna, Wilkinson and Kittner ("McKenna"). Joint Comments of Forward Communications Corp., Group One Broadcasting Co., Guaranty Broadcasting Corp., Lake Huron Broadcasting

Assignment constitute the Commission's decision as to the "fair, efficient and equitable" distribution of FM radio and TV stations mandated by §307(b), these parties contended that the rulemaking proceeding to amend the Tables should satisfy and conclude the §307(b) question for those services. In other words, step one of the licensing process should resolve all §307(b) determinations. As stated by Ward & Mendelsohn

> [A]ny party wishing to apply for a channel in a community other than that specified in the Table of Assignments or in a Petition for Rulemaking (to specify a new channel assignment) shall do so in the course of the Commission's initial allocation procedures rather than via an application.

15. The *Notice's* request for comments on a redefinition of community elicited varied responses. Arch Communications stated that without such a redefinition, unwarranted preferences could become acute. Buena Vista, Ward & Mendelsohn, National Radio Broadcasters Association (NRBA), and Gordon & Healy warned about the impossibility in many instances, due to geographic configurations, of covering a specified community with the requisite signal and avoiding penetration of larger nearby communities with the same signal. Dempsey and Koplovitz suggested that the proposal be treated as one for the largest community to which "significant"[11] principal-city service is provided, regardless of the community specified. Southwest Radio Enterprises disagrees with a redefinition of community. It states, however, that if such a definition is adopted, it not be applied to Class A FM facilities, which are designed to serve small local communities. Buena Vista and NRBA warn that applicants receiving conclusive §307(b) preferences by proposing power sufficient to serve underserved communities could later amend to increase power and/or move their transmitter, thereby providing service to a larger more lucrative community. Ogden Broadcasting Service, Inc. cautions that such a redefinition "would defeat the important policy goals of §307(b) by virtually insuring that smaller communities situated near larger communities will never acquire their own local broadcast transmission services."

16. In commenting on the *de facto* reallocation policy, the Denton Channel Two Foundation and Communications Investment Corporation said that as long as the Tables of Assignment are retained, so must the *de facto* reallocation policy in order to insure that applicants do not subvert the Table. McKenna, recognizing that "inconsistent application of the *de facto* reallocation doctrine has

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Corp., Shamrock Broadcasting Co.; Inc., Ralph C. Wilson Industries, Inc., Summit Radio Corp., Wilson Communications, Inc., WKRG-TV, Inc. ("Licensees").

[11] Significant could mean, according to Dempsey and Koplovitz, "provision to the larger community of at least 50% of the service that would satisfy any of the applicable principal community criteria."

generated considerable confusion, which has only been heightened by the *CIC* decision," suggests a *de facto* reallocation test based on the nine-factor *CIC* test. The National Association of Broadcasters (NAB) suggested a similar test. Taft Broadcasting Co. believes that the nine-factor analysis in the *CIC* case constitutes a reasonable approach to *de facto* reallocation, which the Commission should reaffirm. Gordon & Healy suggested that enforcement of Commission rule §73.315(b) which states that the FM transmitter should be located as near the center of the proposed service area as possible, would solve the *de facto* reallocation problem for FM. On the other hand, Ben Lomond finds that the distinctions some commenters draw about the importance to §307(b) of the *de facto* reallocation policy as opposed to the importance to §307(b) of the suburban community policy and the *Berwick* doctrine are not persuasive.

17. Putbrese and Hunsaker suggests an alternative if the policies are eliminated. The Commission should adopt a policy holding that in cases "where there are mutually exclusive applicants for broadcast licenses in which there is overlap of 50% or greater of the proposed primary service contours of the proposals, then no § 307(b) preference would be awarded."

18. The *Notice's* request for comment on the implementation process should any or all of the policies be abandoned, elicited the full range of options. Seven Parties and Southwest Radio Enterprises said that the current policies should be applied to all applications that have been "cut-off." Arch states that, should the three policies be eliminated and community redefined, those decisions should be applied in all pending cases. Ben Lomond states that the retroactive effectiveness of the abolition of the policies could be so disruptive to cases far into the hearing process that it may be prudent to have various implementation programs dependent on the category of case. Denton believes that *de facto* reallocation issues already designated for hearing should not be deleted.

Discussion

19. Before discussing our decision on the policies under consideration in this item, we believe it important to focus attention on one view expressed by some of the commenting parties. These parties warn of the misrepresentation that is rife when an applicant applies for a facility in a community proximate to a community larger or more lucrative than the designated one. These parties state that the instant policies must be continued so that the Commission can look behind the declarations about community of license made in the application and/or related documents in order to ascertain the real intent of the applicant with regard to the primary community to be served. We acknowledge that such misrepresentations may occur. Nevertheless, policies which attempt to guard against the eventuality of such behavior should be discarded if they are ineffectual or

disserve the overall public interest, as long as other means are available to deter misrepresentations. In this case, statutory and regulatory provisions concerning candor and veracity required on applications, amendments and related statements of fact filed with the Commission adequately respond to the concerns of the parties. Section 312(a)(1) of the Communications Act, 47 U.S.C. 312(a)(1),[12] empowers us to revoke a station license for false statements knowingly made in applications. Section 73.3513(d) of our rules, 47 C.F.R. § 73.3513(d), states that willful false statements made in applications, amendments and related statements of fact are punishable by fine and imprisonment.[13] Stating one community of license, while intending to render primary service to another community fails the candor and veracity test. The requirements for candor and veracity in all dealings with the Commission are mandated by the Communications Act and by our rules. *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981). We remind all applicants that those requirements pertain whether or not the instant policies are maintained.

20. On the basis of the record adduced, we have determined that the policies in question, which attempt to ascertain an applicant's intent with respect to the community to be served, should be abolished. Due to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities. Thus, we no longer see a substantial likelihood that, merely because of proximity to larger urban areas, licensees will provide inadequate service to their communities. Moreover, these policies inhibit entry into unserved communities because they increase costs to suburban applicants and cause delays in processing. In addition, the policies provide incumbent stations a means to delay competition from new suburban stations and thereby retard competition in metropolitan markets. Consistent with this analysis is the indication, gleaned from a review of the cases, that the test for determining intent under the suburban community policy and *Berwick* doctrine may be invalid for that purpose. For these reasons the policies in question undermine the goal of Section 307(b), to

[12] Sections 312(a)(1) reads as follows:

> The Commission may revoke any station license or construction permit—
>
> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308.

[13] Section 73.3513(d) reads as follows:

> Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein, however, are punishable by fine and imprisonment, U.S. Code, Title 18, Section 1001, and by appropriate administrative sanctions, including revocation of station license pursuant to Section 312(a)(1) of the Communications Act.

distribute broadcast services fairly, efficiently, and equitably, and should therefore be abolished.

21. *Suburban Community Policy and the Berwick Doctrine.* We begin the rationale for our decisions with the suburban community policy and its FM corollary, the *Berwick* doctrine.[14] Because the *de facto* reallocation policy is so closely related, much of our reasoning applies with equal validity to that policy. The oldest of the policies, the suburban community policy, was adopted in 1965. At that time, the Commission was faced with the problem of processing "rising numbers of applications for suburban communities, which would be entitled to a first transmission service preference in a comparative hearing." *Suburban Community Policy*, 2 FCC 2d at 191. The Commission also had been instructed by the U.S. Court of Appeals for the District of Columbia to establish or clarify the standards used to distinguish between suburban applicants for the same frequency. *Miners Broadcasting Service, Inc.*v. *Federal Communications Commission*, 349 F.2d 199 (1965). The suburban community policy was the Commission's response to those events.

22. The suburban community policy was designed to further § 307(b)'s mandate for a fair, efficient, and equitable distribution of service by "testing" the AM radio applicant's intent to serve the suburban community designated rather than a metropolitan center located nearby. The test consists of the applicant's evidence that:

1. The suburban community has programming needs, separate and distinct from the central city;
2. Those needs are unmet currently;
3. The applicant's programming proposal will meet the specific, unsatisfied programming needs of the suburb; and
4. Advertising revenues generated within the specified community are adequate to support the programming proposal.

This is a rugged test. An applicant subject to the presumption can attempt to rebut it without a hearing through submission with the application of information on the four issues. An applicant has to demonstrate that its community has separate and distinct programming needs which are currently unmet by existing stations. Establishing with competent and probative evidence that existing stations are not serving the community's programming needs is a difficult task. Normally, program logs and/or portions of an existing station's renewal application are not detailed enough to satisfy the required showing. Moreover, there is little incentive for existing stations, whose personnel are the most knowledgable and thus most competent witnesses, to provide assistance. Consequently, reliance is often placed on costly programming surveys. This evidentiary problem is

[14] The *Berwick* doctrine is rarely invoked in licensing proceedings for television stations because, by virtue of their technical specifications, television stations are designed to serve regional areas.

exacerbated by the fact that the nearby larger community normally has a number of aural facilities whose programming has to be surveyed. In addition, it is not unusual for these nearby stations to direct at least some programming to the smaller suburban community. With regard to demonstrating the source and adequacy of projected revenues, again an applicant is faced with a difficult burden. While the suburban community policy specifically stated that dependence on revenues from other communities would not necessarily be determinative, applicants still have to make an effort to demonstrate the source of their revenues. The only reliable means of obtaining this information involves surveying potential advertisers. Thus, not only are the standards somewhat confused, but even when understood, the evidentiary burdens are time consuming and costly to meet. The burdens of proof required to rebut the presumption were criticized by the United States Court of Appeals for the District of Columbia in 1972. In the Court's view, applicants were left "devoid of any guidelines as to the type and degree of evidence required to rebut the commission's Policy Statement." *Northern Indiana Broadcasters, Inc.*v. *F.C.C.*, 459 F.2d 1351 (1972). Although the Court thought it incumbent upon the Commission to clarify the standards used to grant or deny licenses in suburban communities, the Commission itself has not since 1972 had occasion to resolve a suburban community proceeding after hearing.[15]

23. We have analyzed the reported cases involving the suburban community issue and find what we believe is a disturbing variance in success on rebutting the presumption. When there is only one applicant for a frequency, the suburban applicant has been more successful in rebutting the presumption than when there are competing applicants. This is true in cases in which the presumption was rebutted without a hearing[16] as well as in cases in which the presumption was rebutted in a hearing.[17] When the suburban applicant was not successful in rebutting the presumption in a

[15] *Radio Wheeling*, 85 FCC 2d 486, 490 (Rev. Bd. 1981).

[16] *Pettit Broadcasting Co.*, 21 RR 2d 317 (1971); *David Ortiz Radio Corp.*, 16 FCC 2d 798 (1969); *Wood & Watkins*, 12 RR 2d 97 (1968); *KACY, Inc.*, 15 FCC 2d 33 (1968); *WTOW, Inc.*, 11 FCC 2d 277 (1968); *Burlington Broadcasting Co.*, 9 RR 2d 1119 (1967); *Virginia Broadcasters*, 9 FCC 2d 205 (1967); *Major Market Stations, Inc.*, 8 FCC 2d 13 (1967); *Donnelly C. Reeves*, 6 FCC 2d 531 (1967); *Du Page County Broadcasting Inc.*, 5 FCC 2d 557 (1966); *Clay Broadcasters, Inc.*, 4 FCC 2d 932 (1966). *Wood & Watkins, Burlington, DuPage County* and *Virginia Broadcasters* involved two or more applicants.

[17] *Progressive Broadcasting Co.*, 54 FCC 2d 638 (1975); *Hymen Lake*, 46 FCC 2d 560 (1974); *Great Southern Broadcasting Co.*, 14 FCC 2d 176 (1968); *Jupiter Associates, Inc.*, 12 RR 2d 889 (1968); *Mount-Ed-Lynn, Inc.*, 9 FCC 2d 986 (1967); *Jersey Cape Broadcasting Corp.*, 2 FCC 2d 942 (1966); *Southington Broadcasters*, 2 FCC 2d 936 (1966). *Progressive Broadcasting Co.*was the only mutually exclusive licensing contest case.

hearing, he typically was competing with another for the frequency.[18] These results seem to indicate that, prior to 1975 when the policy was relaxed to exclude most singleton applicants, an applicant who was not vying with another applicant for one frequency had a good chance of convincing the Commission that the designated community truly would be the community served. However, that outcome was not so certain when another applicant joined the contest for a single outlet. We are concerned that the test can be manipulated by the competing applicant so that it becomes not a measurement of intent but a tool useful in defeating a suburban community applicant.

24. Settlements of mutually exclusive licensing contests frequently result in the demise of the suburban community applicant.[19] This result leads us to question whether the burden of rebutting the presumption creates an incentive seemingly at odds with the goals of § 307(b). For example, as a result of the settlement in *H-B-K Enterprises*, the application designating the suburban community of Grandview, Missouri, vying for its first local service, dropped out, and Kansas City, Missouri, was awarded its sixth local service.

25. The Commission acknowledged that the suburban community policy presented a significant obstacle to the authorization and improvement of AM radio service in 1974. In that year, the Commission initiated a rulemaking proceeding designed to liberalize AM radio allocations policies. In the *Notice of Proposed Rulemaking*, 39 Fed. Reg. 42920, published on November 27, 1974, we sought comment on whether or not the rule changes proposed would be effective in encouraging more AM applications if the suburban community policy remained unaltered. The *Report and Order* concluding the proceeding found that, unchanged, the suburban community policy would obstruct the goals sought to be achieved by liberalizing § 73.37 of the rules in order to encourage AM applicants. Therefore, the Commission relaxed the suburban community presumption to apply primarily in mutually exclusive licensing contests

[18] *Centreville Broadcasting Co.*, 50 FCC 2d 261 (1974); *James E. Reese*, 45 FCC 2d 315 (1974); *Broadcasters 7, Inc.*, 46 FCC 2d 282 (1974); *What the Bible Says, Inc.*, 28 FCC 2d 551 (1971); *Harry D. and Robert E. Stephenson*, 33 FCC 2d 763 (1969); *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011 (1969); *Augustus L. Cavallaro, Jr.*, 15 FCC 2d 4863 (1969); *Tri-State Broadcasting Co., Inc.*, 19 FCC 2d 1042 (1969); *Tidewater Broadcasting Co., Inc.*, 12 FCC 2d 471 (1968); *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546 (1968); *KWEN Broadcasting Co.*, 10 FCC 2d 753 (1967); *Boardman Broadcasting Co., Inc.*, 10 FCC 2d 422 (1967); *Goodman Broadcasting Co.*, 10 FCC 2d 141 (1967); *Lebanon Valley Radio*, 2 FCC 2d 683 (1966). *Centreville, Cavallaro, Tri-State, Northern Indiana* and *Goodman* were singleton applicants.

[19] *Ditmer Broadcasting Co., Inc.*, 23 FCC 2d 283 (Rev. Bd. 1970); *Sundial Broadcasting Co., Inc.*, 17 FCC 2d 614 (Rev. Bd. 1969); *Howard M. McBee*, 19 FCC 2d 800 (1969); *H-B-K Enterprises*, 15 FCC 2d 683 (Rev. Bd. 1968); *Logan Broadcasting Co.*, 10 FCC 2d 166 (1967).

in which a hearing was required irrespective of the suburban community issue. We said

> By amending the rules . . . while continuing to impose the significant burden of the § 307(b) presumption, particularly on applications for improvements to existing facilities, we would merely be removing one so-called artificial barrier while leaving another in its place.

54 FCC 2d at 21.

26. In 1969, the Review Board applied the public interest considerations underlying the suburban community policy in an FM licensing case and the *Berwick* doctrine was born. In its decision on the merits in the *Berwick* proceeding, decided *sub nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (1973), the Review Board made clear that the suburban applicants for an FM facility had the burden of proving the same four sub-issues that the Commission had adopted for AM suburban applicants. *See*, paragraph 22, *supra*. However, in two recent cases that we affirmed, the Review Board has criticized those standards as "unworkable, unduly burdensome, and not reasonably related to the Commission's concern" about an applicant's intent to serve the designated community rather than a nearby larger one. *Radio Wheeling, Inc.*, 85 FCC 2d 486, 489 (Rev. Bd., 1981). In *Bie Broadcasting Co.*, 81 FCC 2d 1 (Rev. Bd., 1980), the Review Board rejected outright use of the standards. Thus, the *Berwick* doctrine, as traditionally applied, has been found to be infirm as a test for determining an FM applicant's intent. This result parallels our determination with respect to the suburban community policy, as outlined above. It is appropriate, therefore, that these tests be abolished.

27. We are mindful that the policies were promulgated in order to protect underserved, small, and suburban communities, favored under § 307(b), by assuring they actually receive the service promised. As we said when promulgating the suburban community policy, "developing deserving suburban communities" should be protected in situations where the

> propagation of a competitive signal over a heavily populated area of substantial size, . . . (has) led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

2 FCC 2d at 193. The suburban community policy and the *Berwick* doctrine responded to what apparently was considered the inevitable intent of a small market licensee: to *abandon* the needs of its designated market in those situations in which its signal was able to reach a more populous community. Although that assumption may have been valid in 1965, changes in the broadcasting industry since that time, especially in radio, make the assumption invalid today.

28. The major change of relevance to the present proceeding is the growth since 1965 in the number of broadcasting facilities. At

the end of fiscal year 1965, there was a total of 5,630 AM and FM radio stations in operation and 681 commercial and educational television stations.[20] By the end of fiscal year 1981, that number had grown to 9,087 for radio and 1,035 for television.[21] Growth in the number of stations has increased competition in the industry and created the incentive for broadcasters to discover discrete markets within which to provide an economically viable service. For example, it is possible that a station could earn more revenues as the single station in a 40,000 person community rather than the 11th station in a nearby community of 400,000 persons. Identification with and service of a small community becomes economically feasible after an increase in the number of players in an industry fractionalizes a market.[22]

29. Another change in the broadcasting industry of relevance to this proceeding is the role of demographics, creating an economic incentive for a broadcaster to establish a station in a small community to serve a particular type of audience, instead of in a larger, more heterogenerous nearby community. For example, there are 122 radio stations utilizing Spanish language programming for twenty or more hours per week.[23] Not all these stations are licensed to large metropolitan communities. Among the communities in this category are: *tab546,1

The *Broadcasting/Cablecasting Yearbook, 1982* also lists 151 all news radio stations. This kind of programming appeals to a specialized audience usually described by broadcasting entrepreneurs as well educated and middle income. Among the communities receiving service from all-news stations are the following:[24] *tab546,2

Thus, it is plausible that a broadcaster can fashion a service targeted for a specific community characteristic, such as ethnicity, educational level or cultural preference and find the service economically remunerative enough to be disinclined to abandon the smaller community for the larger.

30. We believe the policies may be used to stem the establishment of competing stations. In practice, the policies are frequently invoked by stations in large communities against the establishment of new or improved service in smaller communities.[25] Moreover, a

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[20] *FCC Annual Report*, 1965.

[21] *FCC Annual Report*, 1981.

[22] *See generally, Inquiry and Proposed Rulemaking; Deregulation of Radio*, 44 Fed. Reg. 57636, published October 5, 1977, for an analysis of competition in radio markets.

[23] *Broadcasting/Cablecasting Yearbook, 1982*, at D-94.

[24] *Id.*. at D-91.

[25] *Communications Investment Corp.* v. *FCC*, 641 F.2d 954 (1981); *Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

Berwick issue is not limited to mutually exclusive licensing contests as is generally true in AM radio since 1975.[26] It can be contained in Petitions to Deny new applications and applications for improved facilities. If the small community applicant is unsuccessful in passing the stringent test created by these policies, new or improved service will be denied to the small community. This is a result at odds with Commission policy fostering competition in the broadcasting industry and with the objectives of § 307(b). If the suburban community policy and the *Berwick* doctrine have worked against the purposes of § 307(b), the statutory provision they were formulated to implement, then their continuation is mere folly. The test for overcoming these policies is a rugged one involving high expenditures for lawyers and engineers who participate in hearings with a resulting delay in the authorization of new service in the smaller community.[27] This tends, ironically, to benefit stations in the larger, metropolitan markets by delaying or frustrating the establishment or improvement of competing stations in nearby smaller markets.

31. After considerable reflection, we fail to see the deleterious effect on the public living in small communities from our authorization of a station that designates the small community as its community of license, locates its main studio in that community, places the requisite signal over the community, fashions a programming proposal to meet the needs and interests of the smaller community, and then also competes in the larger metropolitan area that includes the community of license. The station failing to live up to its obligations to the community of license risks a renewal challenge. In the *Notice of Proposed Inquiry and Proposed Rulemaking* in BC Docket 80–130, 45 Fed. Reg. 26390, published April 18, 1980, we said about the *Berwick* doctrine: "Even if it's true that the station intends to compete in the metropolitan market, this does not mean that it would not be able to offer programming responsive to the needs of this smaller locality." We continue to believe that statement to be true.

32. Many commenting parties in this proceeding discussed the so-called 10- and 15-mile rules, 47 C.F.R. §§73.203(b) (FM) and 73.607(b) (TV). These rules permit an FM or TV station to be licensed to an unlisted community within ten miles (Class A FM) or 15 miles (Class B/C FM and TV) of a community contained in the Tables of

[26] In the *Report and Order* relaxing the applicability of the suburban community policy to mutually-exclusive licensing contests primarily, the Commission affirmed its continuing concern about the intent of applicants with regard to their community of license and stated that it would entertain suburban community issues where warranted even outside a mutually-exclusive contest. 54 FCC 2d at 22. *See e.g., Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

[27] The *CIC* court quoted from one party's pleadings that a hearing in that case would have meant a delay of up to two years and an estimated cost of $50,000 for attorney's fees.

Assignments without petitioning for a rule making to add the community to the Table. These rules were adopted at the time the Tables were adopted.[28] Their purpose was "to preserve flexibility and to permit adjustments . . . upon demand and need in communities other than those listed in the table without going through the rule making procedure." *Notice of Proposed Rulemaking*, FCC 68–54, 33 Fed. Reg. 917, published January 25, 1968. The Commission was well aware of the fact that in adopting a Table of Assignments it was impossible to predict population trends or pinpoint community development. However, "a Table coupled with the flexibility present in a 'twenty-five mile rule,' [now the 10-and 15-mile rule] provides the best means to insure an efficient *present* distribution of channels." 40 FCC at 758. (emphasis added) We also noted, that, "the question of future flexibility becomes increasingly academic as the available FM channels are put to use by present day applicants." *Id.* The decision to provide for flexibility within the limited geographical area surrounding each listed community was appropriate for the early days in which the new services were being established. That condition does not exist today. Television and FM radio are mature, thriving services, well dispersed throughout the United States.[29] We no longer have to foster and facilitate their development as we did when the Tables of Assignments were adopted. In addition, the rules create an unnecessary burden on applicants and the Commission alike. The issues raised under the rules are issues that can be resolved more efficiently and at lower cost to both the applicant and the Commission in a rulemaking proceeding than in a hearing.[30] Therefore, we have decided to eliminate the 10- and 15-mile rules. This, of course, does not mean that applicants are foreclosed from applying for communities 10 or 15 miles from listed communities.

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[28] *Sixth Report and Order on Television Allocations*, 41 FCC 148, 209 (1952); *Revision of FM Broadcast Rules, Third Report, Memorandum Opinion and Order*, 40 FCC 747, 763 (1963). In FM, §73.203(b) originally permitted a station to locate within 25 miles of a listed community without amending the Table of Assignments. This rule was changed in 1968 to 10 miles for Class A stations and 15 miles for Class B and C stations. *Amendment of Section 73.203(b) Concerning the Availability of FM Channels to Unlisted Communities*, 12 FCC 2d 660 (1968).

[29] The Commission has found that "there is no part of the contiguous 48 states which lacks at least some aural broadcast service, and almost no place . . . where multiple skywave services are not available." *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345, 1356 (1980). Similarly, in the television service, the Commission has stated that the "Table of Assignments . . . was designed to provide service to as large a part of the population as was possible and at the same time to provide local outlets for as many communities as possible . . . the goals of the Table have been largely achieved . . ." *Inquiry Into the Future Role of Low-Power Television Broadcasting*, FCC 80–503, 45 Fed. Reg. 69178, 69179 (Oct. 17, 1980).

[30] §307(b) determinations are based on, *inter alia*, the number of transmission services in competing communities, the number of reception services in each, and the size of the communities involved.

Our decision only means that the applicant must petition for a rulemaking in order to add the community to the Table. Henceforth, all §307(b) issues will be concluded in the rulemaking proceeding, which is step one of the licensing process. Step two will be concerned solely with establishing the qualifications of the applicants and, when there are competing applicants, deciding which applicant should prevail.

33. *De Facto Reallocation.* The *de facto* reallocation policy is closely related to the *Berwick* doctrine.[31] It is applicable only in the FM and TV services and does not require a central city-suburban community setting. The Commission has made clear that two essential elements must be present in order for a proponent to prevail on an allegation of *de facto* reallocation: (1) redirection of the service of an FM or TV station from its community of license in such a manner as to constitute its removal from that community, and (2) its effective use to provide service to another community. *Central Alabama Broadcasters, Inc.*, 68 FCC 2d 1339, 1340 (1978); *Hall Broadcasting Co., Inc., supra.* The policy is most often invoked in proceedings to modify existing facilities, for example, to change a transmitter site or to increase power. If, as a result of such a proposal, the station's signal either reaches another community, typically a larger one, or penetrates more of it, the stage is set for a *de facto* reallocation allegation.

34. Some commenting parties have urged that the *de facto* reallocation policy is essential in safeguarding the integrity of the Tables of Assignments and, through the Tables, §307(b). Others have contended that our requirements for, *inter alia*, the requisite signal over the community of license,[32] and the location in that community of the station's main studio,[33] are adequate safeguards. As we will outline below, we find that the policy has many of the same infirmities we found to be present in the suburban community/*Berwick* policies. Therefore, based principally upon those same reasons, and upon the fact that in many instances the *de facto* reallocation policy is indistinguishable from the *Berwick* doctrine, we have determined that the *de facto* reallocation policy no longer serves the public interest and should be abolished.

35. Our major concern with the policy is that rather than furthering the purposes of §307(b), the *de facto* reallocation policy, as applied, has frustrated that end. It is most often invoked against small market stations. The frequent proponents of the policy are

[31] *See, CIC*, 641 F.2d at 967, n. 82.

[32] 47 C.F.R. §§73.188 (AM); 73.315 (FM); 73.685 (TV).

[33] 47 C.F.R. §73.1125. "The Commission has frequently ruled that a station is identified by the place where its studios are kept, not the location of its transmitter or antenna." *Community Telecasting Co.* v. *FCC*, 255 F.2d 891, 893 (1958).

licensees located in larger communities who will face increased competition as the result of an application to modify or improve facilities filed by licensees in nearby smaller communities.[34] The arguments proponents make in support of *de facto* reallocation are strikingly similar to those made by proponents of the suburban community/*Berwick* policies: that a station in the smaller community will, as the result of the modification, direct its service to the larger community thereby abandoning its community of license, undermining the Tables, and subverting the goals of §307(b). Changes in the industry, as we described above, no longer pre-ordain such results. Moreover, the policy places a burden on the establishment and improvement of service in small communities that is not in keeping with the objectives of §307(b). We are also convinced that the policy too frequently is invoked to preclude additional competition. Such a result is an abuse of the policy.

36. Because the *de facto* reallocation policy does not require a central city-suburban community relationship, its applicability is broader than that of the suburban community policy and the *Berwick* doctrine. More than ten years ago, in a case in which a Chicago station filed a petition to deny raising *de facto* reallocation against a Gary, Indiana station filing to relocate its transmitter, we said:

> [W]e did not intend to prohibit a Gary station from serving large portions of the city of Chicago as it is simultaneously providing primary service to Gary. . . . A *de facto* reallocation issue does not arise merely because a licensee proposes an extension of a station's service area, and in some circumstances, the retention of the station's main studio in its community of license may itself constitute sufficient contact with the community to rebut any presumption of reallocation. *Rhode Island Television Corp.* v. *FCC*, 320 F.2d 762 (1963); *Community Telecasting Co. (WXTV)* v. *FCC*, 255 F.2d 891 (1958).

General Media TV, Inc., 27 FCC 2d 861, 863 (1971). The policy can be invoked without regard to the size of the communities involved. Even though the smaller of two communities is an independent, non-suburban, and thriving city, worthy and capable of supporting its own stations, an application to modify the license of a station in that community will likely prompt an allegation of *de facto* reallocation from a licensee in the larger community.[35] The policy also can be

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[34] *Son Broadcasting, Inc.*, 79 FCC 2d 598 (1980); *Hall Broadcasting Co.*, 71 FCC 2d 235 (1979); *D and B Broadcasting Co. (KDAB)*, 67 FCC 2d 243 (1978); *Central Alabama Broadcasters*, 68 FCC 2d 1339 (1978); *Magic Box Media*, 65 FCC 2d 45 (1977); *Kaiser Broadcasting Corp.*, 62 FCC 2d 246 (1977); *Great Trails*, 59 FCC 2d 916 (1976); *Robert P. Adams*, 36 FCC 2d 479 (1972); *General Media TV, Inc.*, 27 FCC 2d 861 (1971); *WSTE-TV*, 11 FCC 2d 1013 (1968).

[35] In the *CIC* case, Salt Lake City stations raised the issue of *de facto* reallocation against Ogden, Utah stations that located their transmitters in an antenna farm

invoked without regard to the type of station involved. For example, a Class C FM station is a wide area station designed to serve a community, city or town *and* a large surrounding area. Similarly, television stations are capable of serving wide areas. However, if such a station applies to modify its signal strength to the highest permitted, an allegation of *de facto* reallocation would undoubtedly be forthcoming from a licensee in a community receiving a new or strengthened signal.[36] The fact that Class C FM and television stations are supposed to serve wide areas is not enough to deflect an allegation of *de facto* reallocation or even to avoid a hearing on the allegation.[37]

37. The *CIC* majority constructed its nine-factor test for determining when a hearing must be held on a *Berwick* or *de facto* reallocation issue from precedents found in four cases decided between 1963 and 1969.[38] The record of Commission action in this area, however, includes other cases whose holdings are at variance with the outcomes cited by the *CIC* majority. Several of these cases pre-date the 1978 Commission action in the cases consolidated in *CIC*,[39] while others are more recent. In three cases decided before Commission action in *CIC*, *Grindstone Broadcasting Corp.*, 41 RR 2d 1107 (1977); *Magic Box Media, Inc.*, 65 FCC 2d 45 (1977); and *Public Service Broadcasters, Inc.*, *supra*, we found that the mere fact that a station proposes to put a city-grade signal over a larger nearby community, in addition to its designated community, is not sufficient to lead to the conclusion that the station intends to serve the larger community.[40] Since Commission action in the *CIC* case, we have continued to move away from designating *Berwick* and *de facto* reallocation issues. In *Hall Broadcasting Co., Inc.*, *supra*, the Commission could not find that a *de facto* reallocation would occur when the transmitter of a Class C FM station was moved to a point

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located near Salt Lake City. This location apparently cured a multipath interference problem, caused by terrain, that impaired reception of the Ogden stations in Ogden. Judge Wald, in dissent, noted, that the Salt Lake City stations were received in Ogden more clearly than was Ogden station *KDAB* before its move.

[36] *WSET-TV*, 80 FCC 2d 233 (1980); *Sarasota-Bradenton*, 70 FCC 2d 699 (1979); *Hall Broadcasting*, 71 FCC 2d 235 (1979).

[37] *Radio Wheeling*, 85 FCC 2d 486 (1981).

[38] *Wometco Enterprises, Inc.* v. *FCC*, 314 F.2d 266 (D.C. Cir. 1963) (per curiam), *rev'g Scripps-Howard Radio, Inc.*, 22 RR 1054 (1962); *Louisiana Television Broadcasting Corp.* v. *FCC*, 347 F.2d 808 (D.C. Cir. 1965) (per curiam), *rev'g St. Anthony Television Corp.*, 2 RR 2d 348 (1964); *Santa Fe Television, Inc.*, 18 FCC 2d 741 (1969); *Berwick Broadcasting Corp.*, 20 FCC 2d 393 (1969).

[39] *See CIC*, 641 F.2d at 977, where majority seems to believe that only one case with a contrary holding pre-dated Commission action in *CIC*.

[40] *See also*, *General Media Television, Inc.*, 27 FCC 2d 861, 863 (1971); *Almardon, Inc.*, 16 FCC 2d 395, 399 (Rev. Bd. 1969); *David Ortiz Radio Corp.*, 46 FCC 2d 341, 342 (Rev. Bd. 1974); *Congaree Broadcasters, Inc.*, 40 FCC 2d 297, 300 (Rev. Bd. 1973).

midway between the community of license and a larger community and the antenna height was increased, permitting greater coverage of the larger community. Nor would we designate a *de facto* issue in *Bie Broadcasting Co.*, 81 FCC 2d 1 (1980) and *Radio Wheeling, Inc.*, 85 FCC 2d 486 (1981). Many years ago, a similar decision withstood judicial scrutiny. In *Rhode Island Television Corp.* v. *FCC*, 320 F.2d 762, 766 (1963), the Court approvingly quoted the Commission's conclusion:

> The mere fact that as a result of the proposed modification, WTEV will improve its signal to the Providence area from Grade B to Grade A does not warrant [the conclusion that there has been a channel reassignment]. In fact, WTEV will continue to be a New Bedford station, will maintain its main studio in New Bedford, will place a principal city signal over that community and will be primarily responsible for providing for the needs of that community under the Rules. Accordingly, grant of the proposal will not change the channel assignment.

The court's unequivocal statement twenty years ago has not resulted in a disciplined use of the policy. Rather, the policy has been invoked to frustrate more competition despite our consistent rejection of such a course. The trend we have documented now must be concluded by abolition of the policy. Anything less would permit future use in a manner we find inconsistent with the public interest.

38. In the future, we will examine applications to detrmine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the rules will result in the requisite signal to the community of license, location of the main studio in that community and a programming proposal that will serve the needs of the community of license. Abolition of this policy does not mean that we will countenance subversion of our rules or the Tables. However, we believe the risk of a renewal challenge for failure *actually* to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent. Abolition of the *de facto* reallocation policy also means that it will not be available for anti-competitive purposes. Ten years ago, in approving an assignment of license application in which *de facto* reallocation was raised by a petitioner to deny, we said:

> [P]etitioner is in effect asking us to hold a hearing to determine whether the assignee will do what it has affirmatively represented it would do. In effect, we are being asked to determine, in advance, whether the assignee will operate KUTE as it has proposed it would. In view of the assignee's explicit representations regarding its proposed operation of KUTE, a hearing on this question is clearly unnecessary. Moreover, such a hearing would deprive the

assignee of the opportunity to demonstrate its good faith. *Brandywine-Main Line Radio, Inc.*, 4 RR 2d 697, 702 (1965). *Robert Adams*, 38 FCC 2d 1, 4 (1972). By abolishing the policy, we will return to that position.

Redefinition of Community

39. The *Notice* asked for comment on whether the term "community" should be redefined for §307(b) purposes to mean, not necessarily the community specified on the application, but the community actually receiving service as a result of the power proposed. We have reviewed carefully the record in this proceeding to determine if it supports such an action. We have determined that it does not. The current definition of community has guided our §307(b) determinations through the years. To change from that concept to one based on a larger geographical or urbanized metropolitan area standard, for example, requires that our action be supported by an adequate record and a rational basis for making the change. We do not believe that we have that record before us in this proceeding. Consequently, we decline to adopt the proposed redefinition.

40. Our refusal to change the concept of community for §307(b) purposes at this time does not foreclose the possibility of doing so in the future. A rulemaking in which comments are elicited on such questions as the benefits to the public interest of a new definition, the costs that may be involved in making a change, the different geographical standards that could be substituted, and the standard that would be preferable could well provide the adequate basis to support a decision to change the concept in the future.

41. *Implementation.* We believe that the public interest requires the implementation of these decisions with respect to the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy upon adoption of this *Report and Order*. Permitting the policies abolished herein to be used, even in pending application contests, would simply continue what we have found to be adverse to the public interest. Therefore, effective with the adoption of this *Report and Order* we will:

1. Process AM radio applications without application of the suburban community policy;
2. Process petitions to amend the TV Table of Assignments without application of the *Berwick* doctrine;[41]
3. Process FM and TV applications for new service or for modification to existing service without application of the *Berwick* doctrine and the *de facto* reallocation policy; and
4. Delete from all hearings, in progress and scheduled to

[41] The *Berwick* doctrine is not entertained in petitions to amend the FM Table of Assignments. *FM Assignment Policy and Procedures*, 90 FCC 2d 88 (1982).

start after adoption of this *Report and Order*, all issues based on the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy.

42. Deletion of §§73.203(b) and 73.607(b) of our rules, the 10- and 15-mile rules, will be phased in. Applications already on file as of the date of the adoption of this *Report and Order* that utilize these rules, will be processed under the rules. Applications filed after the date of adoption of this *Report and Order* utilizing the 10- and 15-mile rule will be accepted only if such an application is tendered as a valid competing application to one the staff has already found acceptable for filing under the 10- or 15-mile rule.

43. *Regulatory Flexibility Act Final Analysis.* The rule and policy changes effected herein are appropriate in light of the changes that have taken place in the broadcasting industry. These revisions will also facilitate the establishment of additional radio and television facilities by abolishing issues that give rise to costly hearings with resultant delays in new service.

44. We received no public comments which specifically addressed the initial regulatory flexibility analysis contained in the Notice of Proposed Rulemaking. Since the decisions we are making in this proceeding relieve an economic burden, especially for licensees in small communities, our action is consistent with the purposes of the Regulatory Flexibility Act. Other alternatives that we might have adopted would have achieved more limited benefits.

45. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) and 303, of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 303, that effective as stated herein, Part 74 of the Commission's Rules is amended by the deletion of §§73.203(b) and 73.607(b). IT IS FURTHER ORDERED, that, effective *April 20, 1983*, the suburban community policy, the *Berwick* Doctrine, and the *de facto* reallocation policy are abolished. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Comments submitted:

Alegria I, Inc., *et al.*:

Algeria II, Inc.

Alegria III, Inc.

Big Time Radio, Inc.

Orange County Broadcasting Corp.

Santa Maria Radio, Inc.

Sonrisa, Inc.

Association of Maximum Service Telecasters

Arch Communications Corp.

Atlantic Broadcasting Corp.

Beaufort County Broadcasting Company, *et al.*:

Dutchess Communications Corp.

Copper Valley Broadcasting Company

Jack A. Carpenter

Ben Lomond Broadcasting Co., *et al.*:

KDAB,, Inc.

Wasatch Broadcasting Partnership

Buena Vista Telecasters of Texas, Inc.

Chatterbox, Inc.

Communications Investment Corp.

Commanche Broadcasting, Inc.

Carl Como, Ronette Communications Corp.

Dempsey and Koplovitz

Denton Channel Two Foundation, Inc.

Edward O. Fritts

Gordon & Healy, Chartered

Historic Hudson Valley Radio, Inc.

Kaldor Communications, Inc.

The Honorable Thomas N. Kindness, Member of Congress from Ohio

McKenna, Wilkinson & Kittner

National Radio Broadcasters Association

National Association of Broadcasters

Mark Pierce

Puerto Rico Broadcasting, Inc.

Putbrese & Hunsaker

Southern Minnesota Broadcasting Co. and Antares Broadcasting Co.

Southwest Radio Enterprises, Inc.

Taft Broadcasting Co.

Town and Country Broadcasting, Inc.

Ward & Mendelsohn, P.C.

Reply Comments Submitted:

American Broadcasting Companies, Inc.

Arcatel, Inc., *et al.*:

Lockhart Omni Communications, Inc.

Cen-Tex Broadcasting Corp.

Texas Professional Communications, Inc.

Lockhart Radio, Inc.

Atlantic Broadcasting Corp.

Beaufort County Broadcasting Co., *et al.*:

KDAB, Inc.

Wasatch Broadcasting Partnership

Buena Vista Telecasters Of Texas, Inc.

Community Television of Connecticut, Inc.

Forward Communications Corporation, *et al.*:

Group One Broadcasting Company

Guaranty Broadcasting Corp.

Lake Huron Broadcasting Corp.

Shamrock Broadcasting Co., Inc.

Ralph C. Wilson Industries, Inc.

Summit Radio Corp.

Wilson Communications, Inc.

WKRG-TV, Inc.

Mid-States Broadcasting, Inc.

National Association of Broadcasters

Ogden Broadcasting Service, Inc.

Public Communications Foundation for North Texas

Sanger Telecasters, Inc.

South Florida Broadcasting Company, Inc.

United Church of Christ, Office of Communication

WDOD of Chattanooga, Inc.

Ward & Mendelsohn, P.C.

February 17, 1983

Statement of

FCC Commissioner James H. Quello

Dissenting in Part

In re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I support these new policies, but I dissent from the Commission's refusal to consider broadening the definition of community in this proceeding.

DISSENTING STATEMENT OF COMMISSIONER STEPHEN A. SHARP

Re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I dissent from the Commission's action because, under the guise of administrative convenience, it returns us to the pre-*Berwick* era without a new answer to the problems as to which the *Berwick* doctrine and its brethren have proven to be an inadequate solution. In so doing, the *Report and Order* exhibits a basic misunderstanding of the nature of major market radio broadcasting. This flaw stems, I believe, from an attempt to justify the original result in the Ogden-Salt Lake City dispute (while avoiding a second reversal and remand) rather than solving the underlying problem. As a result, this proceeding skews the rational, market-based decisions of broadcasters in a manner not mandated by statute and is thus fundamentally inconsistent with the deregulatory principles to which we have sought to adhere.

Problems in the Report and Order

This ad hoc approach to policy-making leads to muddled facts and questionable logic weakening the credibility of the *Report and Order's* entire analysis. For example, paragraph 20 states that "[d]ue to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities." The decision offers no factual support for this conclusory statement and fails to show how, to the extent suburban locations *are* attractive, such attractiveness is not due to the Section 307(b) preference accorded applicants for such communities.

The discussion in paragraphs 27 through 29 provide the clearest example of the frailty of this decision. The *Report and Order* confuses "small market licensees" with suburban applicants and confuses a "market" with a community of license. It labels as an "assumption" the economic necessity of today's major market radio stations: service to an area beyond the borders of a particular suburb. It states that "small, and suburban communities" are "favored under Section 307(b)" without any basis in the record, the statute or the legislative history and in the face of contrary indications in paragraphs 2 and 3. While the decision catalogues the growth of broadcasting and increased competition, it fails to show the relevance of national totals to the suburban community issues at hand.

From the general, the *Report and Order* leads to the specific, arguing that "it is possible that a station could earn more revenues as a single station in a 40,000 person community rather than the 11th station in a neighboring community of 400,000 persons." While

a station with no competition in a community some distance from a metropolitan area could earn substantial revenue, the unsupported suggestion that this is as true for the single licensee in a suburban community blinks at reality.

While a station may be the only licensee in a particular suburb, it is compared with and competes for revenues against all of the other stations in that metropolitan radio market. In nearly every case, a close "identification with service of a small community" in a metropolitan market will ensure that the station will be the 11th rated station if, indeed, it is rated at all. The "fractionalization" of larger markets is both the result of and the reason for distinctive formats based on content designed to appeal to a specific category of listeners generally spread over a geographic area larger than the specific community of license. The two lists in paragraph 29 further demonstrate the unstated and unsupported assumptions which underlie the decision. Even to the extent all news radio usually appeals to a "well educated and middle income" audience, the fact that over ninety percent of such stations are within metropolitan areas does not lend much credence to the implication that serving audiences in more than the community of license is not important for a station's viability. Indeed, without an analysis of the service area demographics for the listed stations, the relevance of paragraph 29 is questionable at best.[1]

An Alternative Analysis

I agree that the *Berwick*, suburban community and de facto reallocation doctrines and the 10- and 15-mile rules, have failed to provide the Commission with an effective means to determine whether broadcast applicants intend to serve suburban municipalities rather than the heart of the market, the center city. Instead, they may have been devices of delay and great cost to both parties and the Commission, often animated by anti-competitive motives.

However, their elimination merely uncovers the deeper issue. The Commission's administrative embellishment of Section 307(b) of the Act has provided an incentive for applicants to seek a suburban community of license in the form of a dispositive preference vis-a-vis those who openly seek to serve a center city. To the extent this regulatory gloss has deterred applicants from serving the market of their choice, it has given rise to *Berwick* et al. as a means of testing their true intent.

To my mind, it is this governmental incentive which is crucial. By

[1] There are factual problems with the lists as well. For example, many people in Henderson, Nevada would be surprised to learn they were not part of the Las Vegas metropolitan area.

removing it, as I proposed, *Berwick* issues would, perforce, disappear as well.[2] My proposal would eliminate any Section 307(b) preference available for an applicant as compared with a mutually-exclusive applicant who seeks a community of license within the same metropolitan statistical area ("MSA"). Thus, in the AM band, the city of license sought would mean the MSA in which that city lies. In the FM and TV bands, the city identified in the Tables would be interpreted to mean the MSA in which that city is located. Thus, an applicant could, if consistent with our technical requirements, apply for any city within the MSA, without a rulemaking and without affecting its Section 307(b) status relative to others in the same MSA. Other technical, coverage, service and studio requirements remain in force. Section 307(b) preferences would continue to be available in situations where a competing applicant seeks a city of license outside of the MSA.

Four objections have been raised in opposition to my proposal. First, it is alleged to be inconsistent with the Commission's reliance on each applicant forthrightly to state its intent to serve its proposed city of license. My proposal purportedly denies that such reliance is feasible and therefore would obviate the intent issue entirely (at least within MSAs). Such an analysis misperceives my approach and, indeed, stands it on its head. No reason has been given as to why the Commission should be concerned with the applicant's stated intent to serve a particular intra-MSA city for Section 307(b) purposes. Until this is answered, there is no harm in eliminating the issue, regardless of whether intent is stated honestly. Our misrepresentation jurisprudence exists to ensure compliance with our substantive rules; we do not and should not establish rules merely in order to test compliance with them.

Second, it is stated that my recognition of the need for waivers in MSAs of unusual size or configuration would be overused or abused. But it is not clear why waivers in this context would be different than in any other. We are legally required to provide for waivers. The cause of legal certainty can only be promoted by stating the parameters for grant at the outset.

Third, my proposal is thought to be internally inconsistent because it does not modify certain localism-based standards, such as city coverage, studio location, ascertainment and programming requirements, while limiting the impact of the Commission's gloss on Section 307(b) itself (within MSAs). However, to the extent there is an inconsistency, it is an argument for a close review of those remaining Commission-imposed requirements, not for the retention of an otherwise erroneous policy. If they have a policy basis different

[2] The non-resolution of this problem here is compounded by immediately eliminating *Berwick*-type issues in pending cases, thus prejudicing the rights of competing applicants who have already applied for a license for a center city rather than a convenient suburb.

from that of the application selection preference, there may be a basis for keeping them. If not, they should be revisited.

Last, my suggestion to use the MSA designed by the Census Bureau and OMB is challenged as not being an "appropriate" delineation of a metropolitan area community for "our purposes". It is difficult to refute these arguments because they advance no standards of their own. Our reliance on city boundaries is indeed longstanding, but continuing past approaches for their own sake is not sound policy-making. Similarly, I recognize that MSAs are not a perfect device in this context; nonetheless, they are the best available geographic definition of the common socio-economic interests and patterns by which we define community. Whatever weaknesses do inhere in the use of MSAs, they are no different than those of municipal borders.

I am also concerned that no cogent arguments have been made to refute my approach to this issue. Neither the existence, nor the market-distorting impact, of the problem have been denied; no pro-suburban incentive legal requirement has been cited and my proposal is more consistent with the general policy of this Commission.

The present Commission has sought to rely on market forces rather than government regulation, whenever feasible. However, by encouraging applicants to seek suburban locations on the basis of the number of stations currently licensed to a particular municipality, the Commission not only ignores the basic fact that radio waves do not stop at political boundaries, but also inhibits the applicant's otherwise market-based decision to serve a perceived market need.

Congress has indicated that, in certain situations, other policies concerns are paramount; and with that decision I have no quarrel here. Nonetheless, the elimination of preferences within a metropolitan area is fully consistent with the language, legislative history and Commission and judicial interpretation of Section 307(b). Significantly, the statutory language itself does not define "community"; the Commission's distribution of broadcast facilities "among the several States and communities" must be "fair, efficient and equitable to each of the same." The complex legislative history of this provision indicates that Congress was concerned primarily with preserving the ability of less populated areas of the country, particularly in the west, but also rural areas in general, to obtain broadcast service. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977). To the extent there was any concern with intra-metropolitan area distribution of facilities, it was not clearly expressed.

Section 307(b), in its present form, was added to the Communications Act in 1936. It was designed to restore the provisions originally enacted in the Radio Act of 1927 which had been significantly revised in 1934. *See* 80 Cong. Rec. 6032 (1936) (remarks of Sen. Wheeler). The 1927 provision was animated by congressional con-

cerns that an excessive percentage of both the total and preferred radio frequencies were used by stations based in the nation's largest cities, particularly those in the east. As Rep. Davis noted, of the approximately 700 stations then licensed, "[a]bout 600 of those are held in 21 States, chiefly in a few large cities." 68 Cong. Rec. 2575 (1927). Similarly, he stated "in the entire South and Southwest . . . there were 79 broadcasting stations, and there was not one first-class license in the whole lot, and is not to-day, south of the Ohio River." *Id.* He had previously cited the fact that there were *"within 50 miles* of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22" as the basis for enjoining the Secretary of Commerce "to effect an equitable distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926) (emphasis added). There is no indication in the legislative history that, in enacting Section 307(b) or its 1927 predecessor, Congress intended that the Commission be concerned with the relative status of a center city versus a suburb, much less grant dispositive preferences on that basis.

As far back as the *Sixth Report and Order on Television Allocations*, 1 R.R. 601, 621 (1952), we have recognized that metropolitan centers and their central cities have "broad areas of common interest" which we must consider in allocating broadcast channels under Section 307(b). As a result, very few suburbs received allocations, even after the center city received several. Indeed, even prior to that point, not only we, but the Court of Appeals as well, have recognized that smaller municipalities in metropolitan areas are properly treated as identical to the center city for Section 307(b) purposes. *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

Similarly, in *St. Louis Telecast, Inc.*, 22 FCC 625 (1957), the Commission refused to find Section 307(b) applicable in selecting among mutually exclusive applicants for a television station in the St. Louis as its proposed city of license. We noted there that both St. Louis and East St. Louis were in the St. Louis Standard Metropolitan Area and that "there exists a single economically and culturally integrated community . . . ." 22 FCC at 713. *See also Rossmoyne Corp.*, 7 R.R. 117 (1951). I would expand that finding, by rule, to all MSAs.

Finally, I would note that, while this issue may appear to be a minor one; it does, in fact, have long-term significance. We are currently considering a proposal to drop-in a substantial number of FM stations. Later this decade, an entire new segment of the spectrum may be made available for AM stations in the 1600 KHz band. Thus, the Commission's action is important and will affect many licensing decisions in the years ahead.

In conclusion, I acknowledge the Commission's willingness to consider a new proceeding, on an accelerated schedule, to provide a more copious record on this issue. While late is better than never,

given the many major policy issues in the mass media area which are to be resolved in the near future, I am not optimistic of an early resolution. Sound deregulation is not accomplished by utilizing two rulemaking proceedings when one will do.

Comparative Criteria
Diversification, of Control of Mass Media, See Also Control Ownership and Management, Integration of

In comparative FM proceeding, applicant with substantial preference for diversification and slight preference for integration is clear comparative winner.
–Thomas C. and Essie L. Collins
BC Docket No. 81–298

FCC 83R–11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THOMAS C. AND ESSIE L. COLLINS, Tenants in Common Burney, California	BC Docket NO. 81–298 File No. BPH–790604AB
MERIT BROADCASTING CORPORATION Burney, California	BC Docket NO. 81–299 File No. BPH–791108AD
For Construction Permit for a New FM Station	

Appearances

Robert A. Marmet and *Harold K. McCombs*, for Thomas C. and Essie L. Collins, Tenants in Common; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, for Merit Broadcasting Corporation; and *Arthur I. Steinberg*, for Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: February 14, 1983; Released: February 17, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Thomas and Essie Collins, husband and wife, presently own and operate AM broadcast station KAVA, Burney, California. They have applied for an FM channel which is also assigned to Burney. To win in this case the Collinses must show that they are the best comparative applicant. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). After a trial-type hearing, Administrative Law Judge Chachkin granted the competing applica-

tion of Merit Broadcasting because the Collinses already operate another station in Burney. Initial Decision, FCC 82D–56, released August 3, 1982. In their brief and exceptions filed September 2, 1982, the Collinses argue that they are the best comparative applicant, and that another station, some 40 miles from Burney, owned by the parents of the principal of Merit Broadcasting should have been attributed to Merit. After reviewing these arguments in light of the record and the reply briefs filed October 12, 1982, the Review Board will affirm the ALJ's selection. Merit is entitled not only to a substantial and decisive preference for diversification of mass media, but also to a very slight preference for participation of ownership in management, see para. 12 below.

2. *Diversification of Control.* The Collinses, husband and wife, filed their application as tenants in common. They also own, as tenants in common, AM station KAVA, the only broadcast station licensed to Burney. If their application is granted, they intend to assign portions of their respective interests to each other so that the new FM station would be owned ninety percent by Mr. Collins and ten percent by Mrs. Collins and KAVA would be owned ninety percent by Mrs. Collins and ten percent by Mr. Collins. *I.D.*, paras. 4–6. This curious 90–10 and 10–90 division for comparative purposes adds up to 100% ownership by the wife and husband. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425–427 (1981); *Absolutely Great Radio, Inc.*, FCC 83R–9, released February 4, 1983, paras. 7–10.

3. Merit is a corporation formed by Jeffrey and Jane Martin, husband and wife, and by Jeffrey's brother, Michael Martin. Mr. and Mrs. Martin have subscribed to one-half of the shares and Michael Martin has subscribed to the other half. Mr. and Mrs. Martin also own ten percent of the issued and outstanding voting stock of NorCal Broadcasting Corporation, licensee of AM station KSXO, Redding, California. The other ninety percent of NorCal's stock is owned by Jeffrey Martin's parents. Jeffrey and Jane Martin have pledged to divest this interest by selling their shares back to NorCal if Merit's application is granted. *I.D.*, paras. 8–14. Thus, the ALJ correctly attributed no media ownership to Merit and awarded it a substantial preference because the Collinses own the only broadcast station in Burney. We affirm his ruling.

4. No ownership interest in NorCal will be attributed to Merit since it made an unequivocal predesignation commitment to divest that interest upon grant of its application. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813–14 (Rev. Bd. 1982) and *Las Misiones De Bejar Television Co.*, FCC 83R–10, released February 11, 1983, note 1. Merit may be charged with Jeffrey Martin's interest as sales manager at KSXO because the Commission will consider significant managerial positions held by owners of an applicant under diversification, see *Policy Statement*, *supra*, 1 FCC 2d at 394 n.5, and Merit did not timely announce Jeffrey Martin's plan to resign his position

at KSXO until after designation. *See Las Missiones, supra,* at para. 12.

5. Far more significant here is the fact that the Collinses own the only broadcast station in the community of license whereas Merit owns no other broadcast interest and that a grant to Merit thus would create a new broadcast voice in Burney and avoid the creation of a two station monopoly in that community. *See Hassayampa Broadcasting,* FCC 82R–70, 52 RR 2d 1059 (Rev. Bd. 1982). That there is a multiplicity of media voices in the proposed service area does not reduce Merit's preference to less than substantial since the fact remains that Merit will provide a second station to Burney and a competing voice whereas the Collinses will not. *See Communications Properties, Inc.,* FCC 82R–64, 52 RR 2d 981 (Rev. Bd. 1982). Finally, the Collinses' argument that Jeffrey Martin's parents are real parties in interest in the Merit application and that their ownership of KSXO must be counted against Merit is rejected for the reasons set forth below in para. 9. But even if we assumed that the parents' station in Redding should be attributed to the children it would not change the outcome of the case because that station is located some forty miles from Burney. Collins Brief, pp. 3–4. The Collinses' station is located in Burney and under the *Policy Statement, supra,* 1 FCC 2d at 394, they receive a more significant diversification demerit for their ownership of another station in the proposed community.

6. *Full-time Participation of Ownership in Management.* The Collinses were awarded 90% full-time integration credit with some qualitative enhancement based on Mr. Collins' proposal to work full time as general manager and because of his local residence and limited civic involvement. Merit was credited with 75% full-time integration and 25% part-time integration because Jeffrey and Michael Martin intend to work full time as general manager and sales manager, respectively, and Jane Martin will work at least twenty hours a week as business manager. Merit also received credit for its principals' residence in the service area and broadcast experience. Although Merit earned greater qualitative enhancement, the ALJ concluded it could not overcome the Collinses' clear quantitative advantage, *see Van Buren Community Service,* 87 FCC 2d 1010 (Rev. Bd. 1981), and they were awarded a slight integration preference. I.D., para. 22.

7. In *Absolutely Great Radio, Inc., supra,* the Board found that evolving Commission policy did not differentiate for integration purposes between common spousal ownership interests but reasonably assumed that the integrated spouse is acting on behalf of the marital entity. Therefore, because of the unique partnership, one spouse's ownership interest would be combined with that of the other co-owner spouse. *Id.* at para. 10. Thus the Merit applicant will be credited with 100% full-time integration by awarding 50% credit for Michael Martin's proposed full-time role and a combined 50% credit

for Jeffrey Martin's proposal. In so doing, we do not attempt to distinguish, as the ALJ did, between the common interests of Jeffrey and Jane Martin in their combined 50% stock ownership but instead attribute Jane Martin's interest to her husband and award him 50% credit based on his full-time proposal. By the same token, with respect to the Collinses, we will attribute Mrs. Collins' ten percent interest to Mr. Collins and assume that he as the integrated owner will act on behalf of both, thus also earning the Collinses 100% full-time integration credit. With both applicants thus entitled to maximum quantitative integration credit, the only differences are qualitative. In their exceptions, the Collinses argue, and we agree, that the ALJ incorrectly denied Mr. Collins credit for his broadcast experience at KAVA because it was not on a day-to-day basis. *See North Carolina Radio Service, Inc.*, FCC 82R-67, 52 RR 2d 993 (Rev. Bd. 1982), where credit for part-time experience was awarded. Nevertheless, Merit's Michael and Jeffrey Martin also have broadcast experience and are better enhanced as local residents because they reside in the service area. Mr. Collins only visits Burney on weekends. Thus, while the ALJ awarded a slight integration preference to the Collinses, we conclude that if any slight integration preference exists, it is in Merit's favor, and accordingly the Initial Decision will be modified in this respect.

8. *Other Matters.* The Collinses point out that on various occasions they attempted unsuccessfully to raise the purported relationship that Jeffrey Martin's parents and NorCal will have to the Merit application. Specifically, they object to the ALJ's refusal to add an issue as to whether NorCal or the Martin parents are real-parties-in-interest in the Merit application (FCC 81M-2356, released July 30, 1981); they except to the refusal to compel Merit to answer interrogatories identifying those persons who assisted in the preparation of their application (FCC 81M-3068, released September 25, 1981); they except to the grant of summary decision to Merit under the financial issue (FCC 81M-3607, released November 13, 1981); and they except to the ALJ's failure to enlarge issues based on Merit's nonreporting of the filing of an application for a new FM station at Eureka, California by the Martin parents. (FCC 81M-3905, released December 10, 1981).

9. These exceptions are made in general terms only without "issue-oriented" explanation and could thus be rejected procedurally for failure to comply with the particularity requirement of Section 1.277(a) of the Rules. *See also Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 875 (1976). Nevertheless, the Collinses' concerns, to the extent they can be perceived are discussed below. The real party in interest issue request was based on the family and ownership interrelationship between the applicant and NorCal and the fact that Merit is being financed in large part by Jeffrey Martin's plan to sell his ten percent interest in NorCal to his parents for $85,000

which he in turn will lend to Merit. FCC 81M-2356, *supra*, at para. 2. Relying on applicable Commission precedent, the ALJ correctly ruled that the test for determining real party in interest status is whether a third party has an ownership interest or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc.*, 49 FCC 2d 962 (Rev. Bd. 1975); *cf. Redwood Television Ministries, Inc.*, FCC 82–482, released December 14, 1982. Family relationship alone is not sufficient to warrant an issue, and even a parental advance of funds without retention of control is not enough. *See, e.g., Michael S. Rice*, 9 FCC 2d 217 (Rev. Bd. 1967). Here, after the Merit application is granted, all ties between it and NorCal will be terminated; thus, as the ALJ concluded, there is no evidence that the parents will exercise any ownership or control over the proposed station. The motion to compel answers to interrogatories was correctly denied since the Collinses did not show the relevance of the proposed inquiry to the only issues in the proceeding, and the request for a real party in interest issue, of course, had been previously denied.

10. As for the ALJ's award of summary decision to Merit under the financial issue, he correctly concluded that Merit had demonstrated a financial cushion considerably in excess of its estimated costs and that therefore it was financially qualified. See FCC 81M-3607, *supra*, at page 2. While the Collinses make reference to the role of NorCal in Merit's financial plan, they have not shown how this allegation in any way impairs the ALJ's conclusion that there was no genuine issue of material fact regarding Merit's financial qualifications. With regard to the request for a Section 1.65 issue, we agree with the ALJ that no issue was warranted because this rule does not require the reporting of all changes, but only those which are substantial and may be of potential decisional significance. *See WEBR, Inc.* v. *FCC*, 420 F.2d 158, 168 (D.C. Cir. 1969); *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, 52 RR 1210, 1220 (Rev. Bd. 1982). As indicated previously, the Martin parents are not real-parties-in-interest in the Merit application; moreover, their filing for the Eureka channel has not been shown to have any bearing on Merit's financial or other qualifications. Thus, the filing does not have any significance in this proceeding.

11. Finally, we affirm the ALJ's denial of an inquiry into the past broadcast record of Station KAVA. FCC 81M-3323, released October 20, 1981. The Collinses failed to make a threshold showing that the station's record is unusually good. *Gilbert Group, Inc.*, 49 RR 2d 1081 (1981). While they were able to show that their performance exceeded promises made in their 1977 renewal application for KAVA in the categories of news and all other programs, exclusive of entertainment and sports, it is also true that KAVA carried significantly less public affairs programming than promised and also fewer public service announcements. In addition, their showing was

limited to KAVA and thus did not permit a comparison with other stations in the same service area. Accordingly, the ALJ correctly concluded on the information before him that KAVA's record was well within the bounds of average performance and was not relevant for comparative purposes. *See Policy Statement, supra,* 1 FCC 2d at 398.

12. *Summation*: Merit has been awarded a substantial and decisive preference under diversification because it, unlike its competitor, will bring a new voice to Burney. Both applicants have been credited with 100% full-time participation, and a slight qualitative preference has been awarded to Merit for its somewhat better enhancement for local residence. But even if this preference had favored the Collinses, as the ALJ concluded, it would not have offset the far more significant diversification preference earned by Merit. See *Communications Properties, Inc., supra.* Accordingly, under the diversification and integration factors of the *Policy Statement, supra,* a grant of Merit's application will better serve the public interest and the community of Burney.

13. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed September 13, 1982, and supplemented September 20, 1982, by Merit Broadcasting Corporation, IS GRANTED, and the amendment IS ACCEPTED; and

14. IT IS FURTHER ORDERED, That the application of Merit Broadcasting Corporation (File No. BPH-791108AD) for a construction permit to establish a new FM broadcast station at Burney, California, IS GRANTED, and the application of Thomas C. and Essie L. Collins, Tenants in Common (File No. BPH-790604AB), IS DENIED.

JOSEPH A. MARINO
Chairman, Review Board
FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THOMAS C. AND ESSIE L. COLLINS, Tenants in Common Burney, California	BC Docket No. 81-298 File No. BPH-790604AB
MERIT BROADCASTING CORPORATION Burney, California	BC Docket No. 81-299 File No. BPH-791108AD
For Construction Permit for a New FM Station	

Appearances

Harold McCombs, on behalf of Thomas C. And Essie L. Collins, Tenants in Common; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, on behalf of Merit Broadcasting Corporation; and *Arthur I. Steinbert* and *Brian Kilbane*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

(Issued: July 29, 1982 Released: August 3, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Thomas C. and Essie L. Collins, Tenants in Common (Collinses) and Merit Broadcasting Corporation (Merit) for authority to construct and operate a new FM broadcast station in Burney, California.[1] By Order (BC 34130) released May 5, 1981, the captioned applications were designated for hearing on the following issues:

(1) To determine with respect to Merit Broadcasting Corporation:
   (a) the source and availability of additional funds over and above the $14,500 indicated; and
   (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

[1] The applications of J. Nevin Smith & Rose Shelton, d/b/a Smith, Shelton Broadcasters and Shasta Communications Company Corporation, which were also designated for hearing, were dismissed with prejudice at the request of the applicants.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[2]

The Order provided for the consideration of comparative coverage evidence under the standard comparative issue. The two remaining applicants, Merit and Collinses, have stipulated that there is no significant difference in the size of the areas and populations which would receive service from either of their proposals. By Order, FCC 81M-3607, released November 13, 1981, Merit's motion for partial summary decision was granted and issue 1 was resolved in favor of Merit. Accordingly, the standard comparative issue is the only issue which remains for resolution in this proceeding.

2. A prehearing conference was held on July 10, 1981. The hearing was held on December 8, 1981 and the record was closed on that date. By Order, FCC 82M-0412, released February 8, 1982, the record was reopened and reclosed. The record was again reopened and reclosed on March 12, 1982 (see *Order*, FCC 82M-0313, released March 12, 1982). Proposed findings and conclusions were filed by Collinses and Merit on February 2, 1982. Replies were filed by Collinses and Merit on February 16, 1982.

Findings Of Fact

Burney, California

3. Burney, California is located in Shasta County in the northern portion of the state (Collinses Ex. 1, p. 2). The population of Burney is 3187 (Merit Ex. 2). Standard broadcast station KAVA is the only broadcast station licensed to Burney (Tr. 67). KAVA is a Class IV station which operates nondirectionally on 1450 kHz with 1 kilowatt daytime and 250 watts nighttime (Collinses Ex. 1, p. 1; Tr. 104). Burney Falls Cablevision, Inc. operates a cable television system in Burney and nearby Johnson Park. The system has an average of 1273 subscribers in Burney. The *Intermountain News*, a weekly newspaper published in Burney, has an average week circulation of about 2,050 newspapers in Burney[3] (Collins Ex. 3, p. 1–2). Television stations KRCR-TV, Channel 7, Redding and KIXE-TV, Channel 9, Redding, place predicted Grade B or better television signals over

[2] The designated issues have been renumbered for convenience.

[3] The following newspapers published in the indicated communities are circulated in Burney: The Mountain Echo published weekly in Fall River Mills has a Burney circulation of 585; the *Record Searchlight* published daily in Redding has a Burney circulation of 1,208; the *Sacramento Bee*, published daily in Sacramento has a Burney circulation of 920; and the *San Francisco Chronicle*, published daily in San Francisco has a Burney circulation of 60–418 (Collinses Ex. 3, p. 3–6). There is no evidence in the record indicating the extent to which events and concerns relative to Burney are covered in the newspapers.

Burney. KRCR-TV is an ABC affiliate. KIXIE-TV is a non-commercial, educational television station (Collinses Ex. 1, p. 3). Two FM stations, KSHA(CP), Redding and KVIP-FM, Redding, place a 1 mV/m contour over Burney (Collinses Ex. 2, Fig. 3).

Thomas C. Collins and Essie L. Collins
Tenants in Common

4. Thomas C. Collins and Essie L. Collins, husband and wife, filed their application as tenants in common. Mr. and Mrs. Collins, also as tenants in common, own and operate standard broadcast station KAVA, which is currently the only broadcast station licensed to Burney, California (Tr. 67). Mr. and Mrs. Collins have agreed that, if their application in this proceeding were to be granted by the Commission, Mr. and Mrs. Collins would assign portions of their respective interests in KAVA and the new FM station to each other. The result would be that the new FM station would be owned ninety percent by Mr. Collins and ten percent by Mrs. Collins, while KAVA would be owned ninety percent by Mrs. Collins and ten percent by Mr. Collins (Collinses Ex. 1, p. 2).

5. Mr. and Mrs. Collins currently maintain two residences. The first is located in Los Altos, California, a suburb of San Francisco. The second is a rented apartment in Burney. Mr. Collins visits Burney usually on weekends only (Collinses Ex. 1, p. 1; Tr. p. 92). The rest of the week is normally spent by Mr. Collins in San Francisco, where Mr. and Mrs. Collins own and operate Collins Marine Corporation, a company which sells and services marine electronics systems (Collinses Ex. 1, p. 1; Tr. 92). Mr. Collins' practice of traveling to Burney on weekends has been going on for approximately three years (Tr. 92). In an amendment to their application filed on August 6, 1980, the Collinses represented that they then planned to retire from their marine business in San Francisco and to move permanently to Burney in approximately one year (Tr. pp. 90–91). The Collinses still plan to retire from the marine business and move to Burney (Collinses Ex. 1, p. 1). However, this has not yet occurred.

6. For Approximately sixteen hours per week, primarily during his weekend visits to Burney, Mr. Collins performs the role of general manager of KAVA. He also is in telephone contact on a daily basis with the resident station manager at KAVA (Tr. pp. 101–102). Mr. Collins will continue to spend an unspecified time at KAVA, assuming grant of the proposed FM station. He expects to perform the same functions for KAVA as he now performs, in a reduced form. The proposed FM facilities and KAVA will be in the same building (Tr. 100–101). Mr. Collins plans to be involved, in the capacity of general manager, in the operation of the proposed FM station on a full-time basis (*i.e.*, at least forty hours per week) (Tr. p. 114; Collins Ex. 1, p. 2). Mrs. Collins will not be involved in the operation of the proposed FM station (Tr. pp. 111–112). Mr. Collins is a member of the

Burney Chamber of Commerce, the Economic Development Corporation of Eastern Shasta County, and the Burney VFW (Collinses Ex. 1, p. 5). Mr. Collins testified that he holds no position as an officer or director of any of those organizations (Tr. 118–119).

7. The Collinses' proposal includes a plan to purchase and install an auxiliary power generator at the proposed FM station (Collinses Ex. 1, p. 6).

Merit Broadcasting Corporation

8. Merit was formed in late 1979 by Jeffrey Benjamin Martin, his wife Janes Frances Martin and his brother Michael Jonathan Martin. All of the 15,000 shares of Merit's common voting capital stock for which subscriptions are outstanding have been subscribed to by Jeffrey, Jane and Michael Martin. Jeffrey and Jane Martin together have subscribed to 7,500 shares, while Michael Martin has subscribed to 7,500 shares (Merit Ex. 1, p. 1). Jeffrey Martin is president and director of the corporation, Michael Martin is vice president and director, and Jane Martin is Secretary, Treasurer and director (Off. Not. taken of Section II, p. 3 of Merit's application).

9. Jeffrey and Jane Martin presently own ten percent of the issued and outstanding common voting capital stock of NorCal Broadcasting Corporation (hereinafter, NorCal), the licensee of standard broadcast station KSXO at Redding, California. The remaining ninety percent of the issued and outstanding common voting capital stock of NorCal is owned by John P. Martin and C. Lucille Martin, the parents of Jeffrey and Michael Martin (Merit Ex. 1, p. 1). As stated in Merit's original application, Jeffrey and Jane Martin have committed themselves to divest all of their NorCal stock if Merit is granted a construction permit for the new FM station in Burney. In this regard, NorCal has agreed to redeem the shares of its stock now held by Jeffrey and Jane Martin (Merit Ex. 1, p. 2). Apart from the minority interest in NorCal presently held by Jeffrey and Jane Martin, none of the three principals of Merit owns any interest in any other medium of mass communication (Merit Ex. 1, p. 2).

10. Jeffrey Martin will serve as the general manager of the new station, working a minimum of 40 hours per week. Jane Martin is proposed as the business manager of the station, initially working on a full-time basis. Once the initial period of construction and operation of the station has stabilized and her services are no longer needed on a 40 hours per week basis, her commitments as business manager will be reduced to part-time, but in no event fewer than 20 hours per week, including time spent both at the station and at home. Michael Martin will become the sales manager for the new

station on a full-time basis, with a commitment of not fewer than 40 hours per week (Merit Ex. 1, p. 1–2).[4]

11. Jeffrey Martin has had past experience in broadcasting. Jeffrey Martin has been employed in the broadcasting industry on a full-time basis for ten years. In January of 1972 he was employed as a full-time salesman at radio station KOPO in Tucson, Arizona. After approximately six months at KOPO, he became employed as sales manager at KHYT, another radio station in Tucson. In December of 1974, he left the position at KHYT to become sales manager and vice president at radio station KATA in Arcata, California which was then owned by John P. and C. Lucille Martin. Finally, in September of 1977, Jeffrey Martin left KATA to become general manager of KSXO in Redding. He has served in that position since that time. He also serves as vice president and a director of NorCal, the licensee of KSXO (Merit Ex. 1, p. 2–3).

12. Both Jane Martin and Michael Martin have been involved in broadcasting since the fall of 1977. Jane Martin has worked as a part-time bookkeeper for KSXO, working at least twenty hours per week, since September of 1977. Michael Martin joined KSXO as an account executive in November of 1977 and has worked for the station on a full-time basis since that time. In October of 1981, he was promoted to the position of sales manager at KSXO in recognition of his excellent performance in sales and motivation (Merit Ex. 1, p. 3).

13. All three of the Merit principals presently reside in Redding, California (Merit Ex. 1, p. 1). Redding is within the service area of the proposed station (Tr. 135). If Merit is awarded the construction permit for the new FM station at Burney, all three of the Merit principals will move to Burney (Merit Ex. 1, p. 2). During the time that the three Merit principals have been working at KSXO, each has taken an active role in local civic and community affairs in Redding, both as individuals and as part of the KSXO staff. They have been personally involved in such charitable activities as the March of Dimes "Gourmet Gala" benefitting the Northern California Chapter of the March's Birth Defects Foundation; the Mental Health Association of California's "Mental Health Skate-a-Thon;" the Shasta County Muscular Dystrophy Association's Telethon and County Fair; the Shasta Dam Area Public Utility District's Spring Festival Arts and Crafts Fair; and the Shasta Blood Center's blood drive. Along with the personal involvement in these activities by Jeffrey, Jane and Michael Martin, the work of local civic and charitable organizations has been actively promoted on KSXO. In addition, Jeffrey Martin is an active member of the board of the Redding Chamber of Commerce (Merit Ex. 1, p. 4).

[4] None of Merit's principals were called for cross examination.

14. Merit proposes to purchase and install an auxiliary power generator at the proposed station (Merit Ex. 1, p. 4).

Conclusions

15. This proceeding involves the mutually exclusive applications of Collinses and Merit to construct a new FM station in Burney, California. The only question to be resolved is the comparative issue. That issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*: (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

16. In the landmark case of *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court set as a First Amendment objective the maximum possible diffusion of communication facilities. In its *1965 Policy Statement*, the Commission describes diversification of control of the media of mass communications as "a factor of primary significance," constituting "a primary objective in the licensing scheme," *Id.* at 394. Diversification is even more significant than integration of ownership and management since it stands alone as one of the two pillars of the Policy Statement while integration is but one of several criteria in determining which applicant would provide the best practicable service to the public. *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977). See also *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348 (Rev. Bd. 1970). In determining what weight to be accorded a media interest under the diversification criterion, the Commission considers local media interests within the principal community to be served to be of most significance, *1965 Policy Statement*, 1 FCC 2d at 394.

17. Jeffrey and Jane Martin presently own a 10% interest in NorCal, the licensee of standard broadcast station KSXO in Redding. However, in light of their commitment to dispose of this interest, the minority interest can not be attributed to them for comparative purposes. *Alexander S. Klein*, 86 FCC 2d 423, 427 (1981).[5] Thus, Merit's principals have no ownership interests in any medium of mass communications. By contrast, the Collinses together own 100% of KAVA, which is the only broadcast station licensed to Burney,

[5] Collinses acknowledges the *Klein* holding, but tries to distinguish its facts from the facts in this case. Collinses point to the proximity of Burney to Redding and the fact that following divestment, NorCal will be owned entirely by Jeffrey Martin's parents. However, nothing in Klein suggests that the distance of the other broadcast station from the community specified by the applicant or divestitute to one's parents rather than a brother is relevant to whether a broadcast interest is attributed to an applicant. In this connection, Collinses' request for a real party in interest issue was rejected (*Order*, FCC 81M-2356, released July 30, 1981).

and they propose to own 100% of the new FM station. It is clear that Merit is entitled to a substantial preference.[6] *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd. 1981); *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980); *Windham Broadcasting Group*, 49 FCC 2d 566 (Rev. Bd. 1974); *KALT-FM, Inc.*, 49 FCC 2d 61 (Rev. Bd. 1974).

Best Practical Service to the Public

18. In determining which application will insure the best practical service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra*, at 395.

19. Mr. Collins, who will own 90% of the proposed FM station, is proposed as full-time general manager. Mrs. Collins, who holds the remaining 10% interest, will not be involved in the operation of the proposed FM station. Collinses will be credited with 90% full-time integration. Collinses' integration proposal is qualitatively enhanced because of Mr. Collins' local residence and involvement in local activities. However, such enhancement is diminished by the fact that Mr. Collins visits Burney mostly on weekends only and spends the rest of the week in Los Altos, near San Francisco, a substantial distance from Burney. Further, Mr. Collins holds no positions as an officer or director of the three local organizations to which he belongs and there is no evidence in the record as to the extent to which he has actually participated in the activities of those organizations. Collinses is not entitled to the slight credit accorded for prior broadcast experience since there is no evidence that Mr. Collins has participated in the day-to-day operation of KAVA, the station which he and Mrs. Collins own.

20. Merit will be credited with 75% full-time integration and 25% part-time integration. Jeffrey Martin and Michael Martin, representing 75% of Merit's stock, will be employed on a full-time basis in the positions of general manager and sales manager, respectively. Jane Martin, who holds the remaining 25% stock interest, has committed herself to continue on a 40-hour per-week basis as long as her full-time services is needed. In light of her

[6] Contrary to Collinses' assertion, the availability of non broadcast media in Burney and reception services to Burney does not diminish Merit's preference. On the contrary, unlike this case, even where other broadcast stations are licensed to the community, a substantial preference has been awarded. See, for example, *Radio Laredo, supra*; *Poet's Seat, supra*. Moreover, *Julie P. Minor* v. *FCC*, 662 F.2d 152 (D.C. Cir. 1980) is inapposite. Collinses is not seeking a different frequency and proposing to contemporaneously vacate its present frequency in order to upgrade its existing AM station. Collinses is seeking an additional broadcast facility.

conditional commitment, Jane Martin will not receive credit for full-time participation. However, she is entitled to credit for part-time participation since her commitment to work part-time is firm and unconditional. Collinses asserts that no credit should be accorded for Jane Martin's proposed participation since, according to Collinses, the record suggests that her position as business manager will involve bookkeeping duties. The contention is rejected. An examination of Merit Exhibit 1 reveals that Jane Martin will be the business manager for the new station and contains no suggestion that she will perform only bookkeeping duties. If Collinses felt a need for a more detailed analysis of Jane Martin's role, they should have called her or her husband for cross-examination at the hearing. Collinses, however, chose not to call any of the Merit principals for cross-examination. The record stands uncontradicted that as business manager, Jane Martin will carry out the duties commonly associated with that term. Further, in the *Policy Statement*, the Commission included the position of business manager in the list of important management positions to which particular weight is to be given. *Policy Statement*, *supra*, at 395. The qualitative attributes of Merit's integrated owners enhance its proposal. Specifically, although none of the Martins are Burney residents, they are entitled to some credit for residence within the service area of the proposed station and active participation in civic activities in Redding and Shasta County, the county in which both Redding and Burney lie, *Waters Broadcasting Corporation*, 88 FCC 2d 1204, 1209–10 (Rev. Bd. 1981). Further, Jeffrey and Michael Martin are entitled to credit for prior broadcast experience. However, Jane Martin's employment as a part-time bookkeeper does not involve activity which would entitle her to credit for prior broadcast experience. Merit also receives credit for female ownership and participation, *Waters*, *supra*.

Other Comparative Factors

21. Both applicants receive a similar preference for proposing to install an auxiliary power generator.

Final Comparative Evaluation

22. Merit is entitled to a substantial diversification preference. Collinses proposal of 90% full-time integration merits a slight preference over Merit's proposal of 75% full-time integration and 25% part-time integration. The attributes of Merit's participating owners are qualitatively superior to those of Collinses. It is settled, however, that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference, *Van Buren Community Service*, 87 FCC 2d 1010, 1022 (Rev. Bd. 1981). Merit's substantial diversification preference clearly outweighs Collinses' slight integration preference.

It is therefore, concluded that a grant of Merit's application would better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Merit Broadcasting Corporation IS GRANTED and the application of Thomas C. and Essie L. Collins, Tenants in Common IS DENIED.[7]

JOSEPH CHACHKIN
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Basic Qualifications
Fairness Doctrine
Fairness Doctrine, Complaint Procedure

No fairness violation established absent evidence licensee failed to address controversial issues of public importance. Quantitative approach rejected in favor of complaint procedure. Applicant disqualified for failure to show equipment availability or adequate finances. Disqualification for site availability overruled where based on licensee's denial of applicant's access to proposed site.

–*United Broadcasting Company*
Docket No. 20611

FCC 83–50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
UNITED BROADCASTING COMPANY (KBAY-FM) San Jose, California	Docket No. 20611 File No. BRH-1402
For Renewal of License	
PUBLIC COMMUNICATORS, INC. San Jose, California	Docket No. 20612 File No. BPH-9229
For Construction Permit	

Appearances

Norman E. Jorgensen, John G. Johnson, Jr., Carl W. Northrop and *Peggy Kobacker Shiffrin*, on behalf of United Broadcasting Company; *Phil Jacklin, Dick Cantu, David McNeil, Len Krimerman* and *James White* on behalf of Public Communicators, Inc.; *Charles M. Firestone* and *Jessica Frazier* on behalf of the American Civil Liberties Union, Santa Clara Valley Chapter, *Amicus Curiae*; and *Charles W. Kelley* and *Barbara A. Kreisman* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: January 27, 1983; Released: February 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER RIVERA NOT PARTICIPATING.

I. INTRODUCTION

1. This proceeding involves the mutually exclusive applications of United Broadcasting Company (United) and Public Communicators, Inc. (PCI) for the same FM broadcast facilities in San Jose, California. On July 31, 1974, United filed an application for renewal of its license for station KBAY-FM.[1] On November 1, 1974, PCI filed its application for a construction permit to establish a new FM broadcast station, specifying the same channel currently used by KBAY-FM.[2] Pursuant to Section 309(e) of the Communications Act,[3] the two applications were designated for hearing under the standard comparative issue.[4]

2. The Review Board (Board) subsequently enlarged the issues in the proceeding as to PCI's basic and comparative qualifications.[5] The added issues were: (a) whether PCI is financially qualified to construct and operate its proposed station; (b) whether PCI has reasonable assurance of the availability of its proposed transmitter site; (c) whether PCI possesses sufficient technical equipment and, if not, the effect thereof upon its technical qualifications; (d) whether PCI's staffing is adequate to effectuate its proposed operation; (e) whether PCI has maintained a public file at its specified location pursuant to Section 1.526; (f) whether PCI's ascertainment was

[1] United's previous license term was the period 1971–1974. United is also the licensee of KEEN, a standard broadcast radio station in San Jose, California. At the time of the hearing, the majority of United's stock was owned by three principals (George D. Snell, Floyd Farr, and George Mardikian). These three principals were then also owners of KCVR Radio (a partnership), the licensee of standard broadcast station KCVR and FM broadcast station KWIN-FM in Lodi, California. Following the conclusion of the evidentiary hearing in this proceeding, George Mardikian passed away. His wife and two children are equal legatees under his will. *See* I.D. Findings, para. 8. Subsequently, George D. Snell transferred his 32.26% share of United common voting stock to the Snell Family Capital Partnership. Also since the hearing, the licenses for standard broadcast station KCVR and FM broadcast station KWIN-FM have been assigned to George D. Snell, Jr., Stephen P. Snell, Christopher R. Snell and Jonathan H. Snell, a California general partnership d/b/a The Snell Brothers Partnership, B. Floyd Farr, and Haig Mardikian and Anita Naz Mardikian, Co-Executors of the Estate of George Mardikian, Deceased, d/b/a KCVR Radio.

[2] PCI is a non-profit corporation operated by a 13-member Board of Directors. *See* I.D. Findings, para. 9.

[3] 47 U.S.C. §309(e).

[4] Order, 40 FR 51501, published November 5, 1975, and issued by the Chief of the Broadcast Bureau pursuant to delegated authority.

[5] Memorandum Opinion and Order, 58 FCC 2d 1346, released April 23, 1976.

conducted as required; and (g) whether PCI's application was properly certified and executed.

3. Thereafter, the Board added the following issues regarding United's basic and comparative qualifications:[6] (1) whether United adequately served the community's needs with respect to public affairs programming during the past license term; (2) whether United has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during the past license term; (3) whether the station's public affairs programming during the past license term reasonably conformed to United's proposal as set forth in its 1971 renewal application; (4) whether United provided equal employment opportunity to Spanish-surnamed persons; (5) whether United has the requisite qualifications to be a Commission licensee; (6) whether United has failed to comply with Section 1.526 and, if so, the effect thereof on its comparative qualifications; and (7) whether there are significant differences between the two applicants as to the scheduling of public affairs programs and, if so, whether such differences demonstrate superior devotion to community service.

4. Prehearing conferences were held in Washington, D.C., on December 10, 1975, August 12, 1976, and March 2, 1977. An admissions hearing was held, also in Washington, D.C., on May 16, 17, 18, 23, and June 30, 1977. Evidentiary hearings were conducted in San Francisco, California, during July 18–22, and 25–29, 1977.

5. The Initial Decision of Administrative Law Judge (ALJ) James K. Cullen, Jr., granted United's renewal application and denied PCI's application.[7] The ALJ found in favor of United under the basic qualifying issues and disqualified PCI with respect to the following basic issues: financial qualifications; technical qualifications; transmitter site availability; staffing; and ascertainment. The ALJ concluded that the comparative issues were mooted by PCI's disqualification. Hence, the Initial Decision did not discuss those issues.

6. In Exceptions to the Initial Decision, filed November 8, 1978,[8] PCI makes two procedural objections. PCI complains that Commission procedures place applicants without legal counsel, such as PCI,

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[6] Memorandum Opinion and Order, 59 FCC 2d 1412, released July 13, 1976. The Board placed the burden of proceeding with the introduction of evidence with respect to issue (2) on PCI. Both the burden of proceeding with the introduction of evidence and the burden of proof in all other respects were placed on United.

[7] Initial Decision, FCC 78D-51, released July 26, 1978.

[8] The first Exceptions filed by PCI on September 15, 1978, were dismissed because they exceeded the page limitations imposed by Section 1.277(c) of the Commission's Rules. Order, FCC 78M-1578, released October 24, 1978. On November 8, 1978, PCI filed a pleading styled "PCI Exceptions to the Initial Decision as Abridged Pursuant to Order." PCI's Abridged Exceptions were deemed timely filed under the deadline prescribed in the Commission's Order of October 24, 1978, *supra*. Order, FCC 78M-1924, released December 26, 1978.

at an unfair disadvantage. Second, PCI excepts to the ALJ's scheduling of the admissions hearing in Washington, D.C. PCI also argues that it is qualified to be a Commission licensee in all respects, and that the ALJ improperly excluded certain evidence which would have demonstrated its basic qualifications. PCI further contends that United should have been found disqualified under the issue regarding the adequacy of United's public affairs programming during the 1971–1974 license term, the Fairness Doctrine issue, and the promise versus performance issue. United and the Broadcast Bureau (Bureau) have each filed a Reply supporting the ALJ's conclusions.[9]

7. On September 15, 1978, United filed limited Exceptions. United contends that the Board erred in designating the basic qualifying issue concerning the Fairness Doctrine and that the ALJ erred in excluding from evidence United's Exhibit 2. On September 28, 1978, the Bureau filed a Reply supporting United's position regarding the Fairness Doctrine issue but urging affirmance of the ALJ's evidentiary ruling. United is the only party which has requested oral argument.[10]

8. Also before the Commission is a Motion for Leave to Intervene as *Amicus Curiae* and to File Brief, and accompanying Brief, filed January 26, 1982, by the American Civil Liberties Union, Santa Clara Valley Chapter (ACLU); Oppositions thereto filed by the Bureau and United on February 3 and 16, 1982, respectively; a Response to those Oppositions, filed March 1, 1982, by the ACLU; a Motion to Strike ACLU's Response, filed March 10, 1982, by United; and an Opposition to Motion Strike, filed March 22, 1982, by the ACLU.[11] In its Response, ACLU points out that it is not seeking full party status in this proceeding, but rather simply wants the

[9] United's Reply was filed on January 10, 1979. In a pleading filed November 30, 1978, the Bureau requested the Commission to accept its earlier Reply, filed September 28, 1978, in response to PCI's original Exceptions, as a Reply to PCI's Abridged Exceptions. The request was granted. Order, FCC 78M-1924, released December 26, 1978.

[10] United's request pursuant to Section 1.277(c) of the Commission's Rules was filed on September 19, 1978. Other outstanding pleadings before the Commission are: (1) a Petition to Enlarge Issues filed by United on January 23, 1980, to add issues regarding the dismissal of Phil Jacklin (a PCI Officer and Director) by San Jose State University and the effect thereof on PCI's character qualifications; (2) an Opposition to (1) filed by the Bureau on February 6, 1980; (3) a Reply to the Bureau's Opposition filed by United on February 14, 1980; (4) a Motion for Leave to Amend Application and accompanying amendment reporting the resignation of PCI Director and Treasurer, Phil Jacklin, filed by PCI on February 20, 1980; (5) Comments on (4) filed by United on February 27, 1980; and (6) a Motion for Leave to Amend application and accompanying amendment, filed February 8, 1982, by United. United's Petition to Enlarge Issues is rendered moot by our result in this Decision. PCI's and United's Motions for Leave to Amend Application are granted.

[11] For the reasons set forth in its Motion for Extension of Time request, filed February 2, 1982, we have accepted United's Opposition.

Commission to accept and consider its *amicus* brief. Recognizing ACLU's asserted interest in the Commission's Fairness Doctrine, which is one of the matters at issue in this proceeding, we will grant its request.[12]

9. After reviewing the record, the Initial Decision and the various pleadings filed by the parties to this proceeding, we conclude that the ALJ's ultimate conclusion is correct and affirm the grant of United's renewal application. However, we disagree with some of the findings and conclusions regarding the basic qualifying issues. We conclude that PCI is not qualified to be a Commission licensee, but base that conclusion on PCI's failure to make an adequate showing under the financial and technical issues designated against it. We further conclude that PCI did make an adequate showing under the transmitter site issue and the staffing issue. The ascertainment issue designated against PCI must now be deleted from the proceeding pursuant to our recent *Report and Order in the Matter of Deregulation of Radio.*[13] The Initial Decision is thus modified in accordance with our findings and conclusions on these latter issues. Regarding United's basic qualifications, we affirm the ALJ's conclusions in favor of United. However, upon reviewing United's Limited Exceptions and the Bureau's Reply, we conclude that the Board erred in designating the Fairness Doctrine issue against United. Finally, we concur in the ALJ's conclusion that the comparative issues are mooted by resolution of the basic qualifying issues.

10. United's request for oral argument will be denied. We do not believe oral argument on United's Limited Exceptions would materially assist us in our resolution of this proceeding.

II. PCI'S PROCEDURAL CONTENTIONS

11. *Due Process.* PCI claims that it was denied due process because Commission proceedings are inaccessible and incomprehensible to parties unable to afford legal counsel. Both the Bureau and United reply that PCI is an applicant seeking a construction permit for a commercial FM radio station, and as such, it voluntarily chose to initiate this comparative renewal proceeding and must be held to the same standards as other applicants. Furthermore, the Bureau and United argue that PCI was forewarned about the difficulties of

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[12] In light of our holding, *supra*, United's Motion to Strike is denied. While the Commission's Rules do not provide for *amicus* briefs, their acceptance is a matter of agency discretion. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018–19 (1981), *appeals affirmed sub nom. Central Florida Enterprises, Inc.* v. *FCC*, No. 81–1796 (D.C. Cir., filed July 13, 1982); *The Trustees of University of Pennsylvania*, 42 RR 2d 871 (1978).

[13] 84 FCC 2d 968 (1981), *recon. denied*, FCC 81–366, released August 28, 1981, *appeal docketed sub. nom. Office of Communication of the United Church of Christ, et al.* v. *FCC and USA*, Nos. 81–1032, *et al.* (D.C. Cir., petition for review filed January 14, 1981).

proceeding without legal counsel, and that the ALJ on several occasions adjusted procedures in deference to PCI's lack of familiarity with Commission practices.

12. We agree with the Bureau and United that an unsuccessful *pro se* applicant is not entitled to relief simply because it was not represented by counsel. Where, as here, a party elects to proceed *pro se*, it must assume the burden of becoming familiar with Commission Rules and conforming to Rule requirements.[14] An applicant who elects to proceed without counsel cannot be allowed to disavow its decision after an unfavorable result.[15]

13. PCI chose voluntarily to proceed without benefit of counsel, despite the ALJ's warnings about the disadvantages of *pro se* representation.[16] Also, during the course of the proceeding the ALJ explained Rule requirements and repeatedly made allowances for PCI's lack of familiarity with Commission procedure. For example, PCI was granted numerous extensions of time to file pleadings. Due to a possible misunderstanding as to the time for discovery, PCI was also granted discovery after it had already received United's exhibit exchange.[17] Finally, in reviewing PCI's Exceptions, we too have overlooked numerous procedural deficiencies and have undertaken an exhaustive review, on our own motion, both to assure fair treatment of PCI before the Commission and to assure a result that best serves the public interest.

14. *Location of Admissions Hearing.* PCI excepts to the ALJ's refusal to hold the admissions portion of the evidentiary hearing near Jan Jose, California.[18] Admissions sessions took place at the Commission's office in Washington, D.C., on May 16–18, 23, and June 30, 1977. The evidentiary hearing was conducted in San Francisco,

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[14] *Family Television, Inc.*, 85 FCC 2d 986 (1981); and *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739 (1972).

[15] *Enterprise Broadcasting, Inc.*, 60 FCC 2d 852, 857 (1976); and *South Sausalito Cable TV*, 63 FCC 2d 516 (Rev. Bd. 1977).

[16] Tr. 21, 98, 103, 115–16.

[17] Transcript of March 2, 1977 prehearing conference; Order, FCC 77M-443, released March 4, 1977.

[18] The direct testimony in this case was required to be reduced to writing. Tr. 126–30. Prior to the evidentiary hearing, several admissions sessions were held. At these admissions sessions the ALJ ruled on the admissibility of the various exhibits which each party intended to offer as evidence at the evidentary hearing. PCI contends that the admissions sessions constituted part of the evidentiary hearing because the ALJ considered the first admissions session as commencing the evidentiary hearing in his Memorandum Opinion and Order, FCC 77M-114, released June 21, 1977, dismissing PCI's Motion for Summary Decision as untimely under Section 1.251(a) of the Commission's Rules. In terms of the actual reception of evidence, however, the evidentiary hearing is distinct from the admissions hearing.

California, on July 18–22, and 25–29, 1977. PCI argues that the two Orders designating the admissions hearing in Washington, D.C.,[19] contravened an earlier Order specifying a hearing location near San Jose[20] in response to PCI's Petition for Local Hearing, filed November 18, 1975. PCI argues further that the designated hearing location violated Section 1.253(d) of the Commission's Rules, which gives it a right to a local hearing. PCI claims that it was prejudiced because only one of its Directors (Len Krimerman) was available to attend the admissions sessions in Washington, D.C., and he was unfamiliar with PCI's prepared case. The Bureau and United reply that PCI never objected to the location prior to the admissions hearing, that PCI did not suffer any prejudice because it was represented at each session and, further, that PCI has failed to demonstrate any specific error in the ALJ's evidentiary rulings.

15. There is no right to a local hearing under Section 1.253 of the Commission's Rules. Commission policy in scheduling field hearings is founded upon public interest considerations.[21] Moreover, the actual evidentiary hearing in this proceeding was conducted near San Jose, consistent with the Commission's customary practice of scheduling renewal hearings at the station's location.[22]

16. As to the separate admissions hearing, we conclude that the ALJ did not err in convening this part of the proceeding in Washington, D.C. In *Rocket Radio Inc.*,[23] the Commission was faced with a change of venue request for the evidentiary hearing and ordered a change to a field situs. That case involved serious character issues which required credibility and demeanor findings, a large number of witnesses who resided in the proposed community of license, and a competing applicant, which was a non-profit corporation that would have been unable to bear the expense of transporting witnesses to Washington, D.C. None of these considerations apply to an admissions hearing. The admissions hearing in this proceeding was for the sole purpose of determining the admissibility of evidence. No evidence was actually received. Exhibits intended as direct and rebuttal testimony were merely identified, and the ALJ ruled on their admissibility. Hence, credibility and demeanor findings were

[19] FCC 77M-443, released March 4, 1977; and FCC 77M-1108, released June 20, 1977.

[20] By Memorandum Opinion and Order, FCC 75M-2067, released December 8, 1975, the Chief Administrative Law Judge ordered a transfer of the hearing to a location near San Jose, California, pursuant to PCI's request.

[21] Commission practice in scheduling evidentiary hearings is not founded solely on the particular type of proceeding involved, but on the overriding public interest consideration to conduct fair and impartial hearings and to compile full, complete, and accurate records. *Cathryn C. Murphy*, 23 FCC 2d 204 (1970). *See also Rocket Radio, Inc.*, 57 FCC 2d 759 (1976).

[22] It is Commission policy to schedule the evidentiary hearing in a renewal case at the station's location and in a new license case, in Washington, D.C. *Cathryn C. Murphy*, 23 FCC 2d 204 (1970).

[23] 57 FCC 2d 759 (1976) (comparative hearing for new FM broadcast station).

not at issue, the presence of local witnesses was not required, and the only expense borne by the applicant involved representation costs.

17. Additionally, PCI has not demonstrated how it was prejudiced by the location of the admissions hearing. Elsewhere in its Exceptions PCI alleges error in certain evidentiary rulings, and we have treated these matters separately. However, PCI offers no argument as to how a local admissions hearing would have made a difference, except to suggest that Len Krimerman, the only PCI Director able to attend the hearings, was not as familiar with the evidentiary presentation as were other members of PCI's Board of Directors. PCI does not name any of its other Directors who were allegedly better acquainted with the case but unable to attend the hearing. Len Krimerman represented PCI throughout the admissions hearing, and he was PCI's duly authorized representative.[24] Morever, prior to the commencement of the admissions hearing, the ALJ explained its purpose and gave PCI ample opportunity to indicate then how its representation would be hampered by the location, but PCI made no such showing.[25] In view of the foregoing, we not only fail to see how PCI was prejudiced by the location of the admissions hearing, but we are convinced that the ALJ made substantial efforts to protect PCI's rights.[26]

III. UNITED'S LIMITED EXCEPTIONS

18. In response to a Petition to Enlarge Issues filed by PCI, the Review Board enlarged the issues to, *inter alia*, include:[27]

(1) whether United adequately served the community's needs with respect to the public affairs programming during the 1971–74 license term; and

[24] Len Krimerman was designated by the Board of Directors, along with PCI's four officers, to represent the applicant at any prehearing conference and throughout the hearings. Motion for Leave to File Certified Corporate Resolution, filed June 10, 1976. Tr. 52. In fact, Mr. Krimerman continued as one of PCI's representatives during the evidentiary hearings.

[25] During the prehearing conference on August 12, 1976, the ALJ specifically asked PCI if it would be burdened by sending its authorized representative (Len Krimerman) "or any other party" to the admissions hearing in Washington, D.C. Although PCI suggested the possibility of a local admissions hearing, PCI never indicated then that its representation would be hampered in any way by the Washington, D.C. location. Tr. 71–74.

[26] The ALJ rescheduled the admissions hearing from May 18th to May 23rd in order to accommodate Krimerman's schedule. Tr. 502–03; Order, FCC 77M-955, released May 20, 1977. Although Krimerman was not presented at the June 30th session, the ALJ determined that all PCI Exhibits at issue should be admitted to protect PCI's rights. Tr. 674–90.

[27] Memorandum Opinion and Order, 59 FCC 2d 1412 (Rev. Bd. 1976). United appealed the Board's enlargement of issues, but the Commission dismissed the interlocutory appeal on procedural grounds, noting that the merits of the questions raised could be considered after the Initial Decision is released. Order, FCC 77–141, released March 3, 1977 (Chairman Wiley issuing a concurring statement).

(2) whether United has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during its past license term.

In its Limited Exceptions, United argues: (1) that the Board erred in adding the second issue (Fairness Doctrine); and (2) that under the first issue (program responsiveness), the ALJ erred in rejecting an evidentiary submission which would have shown how public interest programming could be "fitted into" United's program format.

19. *Designation of a Fairness Doctrine Issus.* PCI filed a petition for enlargement of issues alleging that Station KBAY-FM broadcast insufficient public issue programming. PCI based its Fairness Doctrine charge on the percentages given for news and public affairs in United's 1971 and 1974 renewal applications and on five days of monitoring KBAY-FM's programming. PCI claimed that KBAY broadcast only about 13.4 minutes of public affairs programs a week; that national news served almost exclusively as the source of supply for the "issue-oriented" news; that the size of the news staff (one announcer editing the wire services) and the absence of any local news-seeking sources indicated a lack of interest in "informational programming" and that only two nationally-syndicated, program-length public affairs programs were presented during that monitoring period. PCI also relied on the affidavit of Al Calame who stated that he recorded the station's programming between the hours of 6:00 A.M. and midnight from June 26 through July 2, 1974, and that at no time did United publicize upcoming public affairs programs, present "issue-oriented" spot messages apart from anti-smoking announcements, or broadcast rebuttals to any of the station's non-issue-oriented editorials.

20. The Board designated the Fairness Doctrine issue pursuant to Section 315 of the Communications Act,[28] noting "the paucity of public affairs generally, the absence of a local news staff, and the licensee's failure to furnish any information with respect to its coverage of controversial issues of public importance . . ."[29] United contends that a licensee's compliance with the Fairness Doctrine should not be evaluated as part of the triennial renewal process, citing the Commission's 1974 Fairness Report.[30] United further argues that specification of the Fairness Doctrine issue here

[28] 47 U.S.C. §315(a).

[29] 59 FCC 2d at 1414–14. The Board cited *In re Complaint of Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[30] *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1 (1974), *aff'd on recon.*, 58 FCC 2d 691 (1976), *remanded in part on other grounds sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 567 F 2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

contravenes the Board's own precedent in the case of *Federal Broadcasting System, Inc.*,[31] and that, since the responsiveness issue necessarily includes a Fairness Doctrine inquiry, specification of a separate Fairness Doctrine issue was superfluous.

21. The Bureau agrees that the Board erred in specifying the issue because PCI failed to comply with the specificity requirements of Section 1.229(d) of the Commission's Rules. PCI did not identify the local issues of public importance, or indicate any local issues which received less than adequate coverage. However, as to United's other arguments, the Bureau asserts that *National Citizens Committee for Broadcasting* v. *FCC.*[32] did not foreclose evaluation of a licensee's compliance with the Fairness Doctrine at renewal. That case simply affirmed the Commission's position that review of Fairness Doctrine complaints *only* at the time of renewal would discourage the filing of complaints and deny the Commission the ability "to remedy violations before a flagrant pattern of abuse develops."[33] The Bureau also distinguished *Federal Broadcasting System, Inc.*,[34] where the Board designated a broad program responsiveness issue and did not add a separate Fairness Doctrine issue. The Bureau claims that the responsiveness issue in *Federal Broadcasting System, Inc.*, encompassed all non-entertainment programming, whereas the programming "responsiveness" issue here was limited to public affairs programming.

22. We conclude that a Fairness Doctrine issue should not have been designated against United.[35] PCI's Petition to Enlarge Issues did not make the requisite showing for designation of a Fairness Doctrine issue. Its pleading presented general conclusory allegations concerning KBAY-FM's news and public affairs programming, and did not identify a single controversial issue of public importance which was not adequately covered during the license term.[36] It was

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[31] 62 FCC 2d 861, 865 (Rev. Bd.), *recon. dismissed*, FCC 77R-26 (1977).

[32] n. 30 *supra*.

[33] 567 F.2d at 1116. The Bureau also cites *Columbia Broadcasting System, Inc.*, 56 FCC 2d 313 (1975).

[34] n. 31, *supra*.

[35] We reject United's argument that it is inappropriate to consider licensee compliance with the Fairness Doctrine as part of the renewal process. It is true that the *1974 Fairness Report*, 48 FCC 2d at 18–21 and *Fairness Doctrine*, 89 FCC 2d 916, 920–24 (1982), found that a case by case consideration of Fairness Doctrine allegations, predicated on the filing of timely complaints, will enable the Commission to respond to the public when compliance is questioned; and that the complaint process provides for more effective enforcement than a review of compliance during renewal proceedings. There is, however, nothing in the *1974 Fairness Report*, *Fairness Doctrine*, or any other Commission precedent, which would prevent us from considering properly raised fairness allegations as part of the renewal process.

[36] Subsection (d), 47 C.F.R. §1,229(d), provides that motions to enlarge issues: shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be

incumbent upon PCI to make a *prima facie* showing that United's "Fairness Doctrine obligations are being avoided, or that 'critical' issues are being ignored."[37]

23. In connection with the Fairness Doctrine issue, we deem it appropriate to address briefly the *amicus* comments presented by ACLU. Our conclusion that a Fairness Doctrine issue should not have been designated is based upon existing Commission precedent. ACLU urges the Commission to adopt a "quantitiative" standard for judging compliance with the Fairness Doctrine. Noting that the Board specified a fairness issue based upon the amount of time (or lack thereof) which United devoted to controversial public issues, ACLU argues that the Commission should affirm this approach and require a minimum level of attention to controversial issues, whether or not a "burning issue" is identified. Under this approach, the Commission would assess the amount of time a licensee gives to controversial matters and the timing of the broadcasts (such as prime time versus early morning hours of low listenership). ACLU argues that this offers a more "content-neutral framework" for evaluating a licensee's efforts to meet the Fairness Doctrine and also is consistent with the Commission's recent *Report and Order in the Matter of Deregulation of Radio.*[38]

24. ACLU has failed to convince us that the Commission's approach to the evaluation of licensee compliance with the Fairness Doctrine should be changed. Our present policy involves a content-neutral review in response to listener complaints. The Commission does not endeavor to determine which issues should be addressed, and Fairness Doctrine compliance is reviewed only when evidence is presented that a licensee failed to cover a specific, significant controversial issue. However, even then, the Commission's review of a licensee's programming judgments is concerned only with whether the licensee acted reasonably to fulfill its fairness obligations.[39]

25. Nor are we persuaded that the "quantitative" approach suggested by ACLU would be more effective than our present procedures. We recently addressed the propriety of a quantitative approach in denying reconsideration of the *Fairness Doctrine Inquiry.*[40] There, the petitioner argued that the Commission need only be concerned with whether the licensee has devoted a reasonable amount of time to controversial issues of public importance, and that we should not get involved with the appropriateness of the

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supported by affidavits of a person or persons having personal knowledge thereof.

See also Mount Hood Radio and Television Broadcasting, 58 FCC 2d 288, 296, *recon. denied*, 59 FCC 2d 1198 (1976); *American Broadcasting Cos., Inc.*, 56 FCC 2d 275, 277–80 and 282–84 (1975), *recon. denied*, 60 FCC 2d 509 (1976).

[37] *Fairness Doctrine, supra*, 89 FCC 2d at 921.

[38] 84 FCC 2d 968 (1981).

[39] *1974 Fairness Report, supra*, 48 FCC 2d at 10.

[40] 74 FCC 2d 163 (1979), *recon. denied*, 89 FCC 2d 916 (1982).

issues covered. We rejected this argument finding that effective enforcement of the Fairness Doctrine requires specific scrutiny of issues to determine if they are both controversial and of public importance. Any review of fairness complaints without consideration of whether issues presented were controversial issues of public importance would be meaningless. Hence, a quantitative approach for evaluating fairness concerns would not afford a significantly better method for enforcement of the Fairness Doctrine.[41] Finally ACLU's argument concerning the *Deregulation of Radio* [42] is misplaced. The Memorandum Opinion and Order in the *Deregulation of Radio* made clear that none of the procedures contemplated in that proceeding would alter the Fairness Doctrine obligations of licensees.[43] Moreover, in *Fairness Doctrine*, we specifically held that the *Deregulation of Radio* had no impact on the Commission's approach to dealing with Fairness Doctrine concerns.[44]

26. *ALJ's Evidentiary Ruling.* United also excepts to the ALJ's rejection of Exhibit 2,[45] which it submitted in response to the program responsiveness issue.[46] United's Exhibit 2 contains certified copies of excerpts from license renewal applications of 58 FM broadcast stations filed during the years 1973–75. The filings were from 56 FM stations in cities nationwide allegedly having the same "beautiful music format" as KBAY-FM and from two other FM stations in the San Jose area. United claims that the Exhibit was offered to show how FM stations across the country, which present the same format as KBAY-FM, deal with public affairs programming. According to United, the level of responsiveness of a "beautiful music" format differs from the level of responsiveness for other kinds of entertainment formats, such as an all news and talk format.

27. United relies upon Question and Answer 34 of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants (1971 Primer)*[47] for the proposition that programming responsive to ascertained needs may vary with the station's program format. United also relies upon *Moline Television Corp.*,[48] noting that the Commission there compared the performance of the challenged renewal applicant with the performance of other stations. United argues further that the admission of Exhibit 2 into evidence would have enabled the parties to explore the basis, if any,

[41] 89 FCC 2d at 922.

[42] 87 FCC 2d 797 (1981).

[43] *Id.* 84 FCC 2d at 979.

[44] 89 FCC 2d at 924–25.

[45] The ALJ rejected the Exhibit, entitled "Public Affairs Programming by KBAY's FM Peers," at the May 16, 1977 admissions hearing for the reason that the program performance of other stations was not relevant. Tr. 193–200.

[46] *See* para. 18, *supra.*

[47] 27 FCC 2d 650 (1971).

[48] 31 FCC 2d 263 (1971).

which the Board had for treating KBAY-FM differently from similarly situated applicants, contrary to *Garrett Broadcasting Service* v. *FCC*.[49]

28. The Bureau supports the ALJ's evidentiary ruling. According to the Bureau, the *1971 Primer* makes clear that an applicant which proposes a specialized format is still obliged to present programming responsive to ascertained community needs. The Bureau also argues that *Moline Television Corp.* is inapposite, because the data was submitted in response to a promise versus performance issue and the licensee was seeking to show programming needs in its market.[50] Morever, the Bureau contends that United's Exhibit failed to show that the other stations had formats similiar to that of United, since "beautiful music" formats may differ in significant respects. It also argues that the Exhibit merely offers a comparison of KBAY-FM's programming performance with the programming representations in other stations' renewal applications, and, hence, it remained for United to show that these allegedly comparable stations had performed as promised. The Bureau argues that the Exhibit has no probative value, as the ALJ ruled, because an evaluation of a licensee's programming performance is based upon its responsiveness to community problems, needs, and interests, not upon a comparative ranking of stations in a market.[51]

29. In *Moline*, the Commission found that the comparison with public affairs programming from stations serving the "same market or elsewhere" provides a "pertinent standard" for determining whether a licensee's programming is responsive to the public.[52] The comparison in that proceeding, however, was confined to stations serving the same market. Unlike the stations compared in *Moline*, 56 of the stations documented in Exhibit 2 are not in the same market as San Jose. While *Moline* recognized that data from stations in other markets may be of value, there is no evidence that the communities those stations serve have needs and interests similar to San Jose. Absent such a threshold showing, we find that the data concerning those stations would be meaningless for determining whether United's programming is responsive to the needs and interests of San Jose. Moreover, in light of our resolution of the program responsiveness issue,[53] any error in excluding Exhibit 2 from evidence and in failing to consider programming of similar stations, would not be of decisional significance.

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[49] 513 F.2d 1056 (D.C. Cir. 1975). The language, which United quotes, states the proposition that agency action will be set aside when the agency fails to reconcile an apparent difference in treatment accorded litigants in like circumstances.

[50] *See* n. 48 *supra*.

[51] The Bureau cites *Hubbard Broadcasting, Inc.*, 48 FCC 2d 517 (1974), *aff'd sub nom. Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732 (1976).

[52] 31 FCC 2d at 265, 269–70.

[53] Paras. 30–39 *infra*.

IV. UNITED'S BASIC QUALIFICATIONS

30. *Responsiveness of Public Affairs Programming to Community Needs.* The ALJ's findings, based upon United's 1971 ascertainment survey, list the following ten most significant needs in the San Jose community:[54] (1) crime, law and order, police protection; (2) improved educational facilities; (3) lack of mass transportation; (4) air and water pollution and waste disposal; (5) moral laxity; (6) unemployment, recession, job losses; (7) drug abuse; (8) welfare; (9) minority problems including housing; and (10) population congestion.

31. United alleged that these 13 public affairs programs were regularly carried during the license term in response to ascertained needs: (1) "Community Focus;" (2) "You and Your Community;" (3) "San Jose Rescue Mission;" (4) "State Capitol Report;" (5) "Washington Window;" (6) "UN Week in Review;" (7) "San Jose Yesterday and Today;" (8) "Perspective;" (9) "Overseas Assignment;" (10) "Editorials;" (11) "Free Speech Messages;" (12) "Public Service Announcements;" and (13) "Guestitorials" (guest editorials). The findings also note that the station presented regular newscasts. Although KBAY-FM did not maintain a local news director or a local news staff, and its news source was the United Press International wire service, 25 percent of the news did address local matters.[55] The ALJ's findings recite the evidence concerning program formats, topics covered on the public affairs programs, broadcast times and dates, and the qualifications of the program hosts.[56]

32. The ALJ concluded that United adequately served the community's needs with respect to its public affairs programming during the 1971–74 license term.[57] The ALJ cited, as public affairs programming, "You and Your Community," "San Jose Yesterday and Today," station editorials and public service announcements, the local newscasts, free speech messages, "Community Focus," and the four nationally produced programs, "Washington Window," "Perspective," "UN Week in Review," and "Overseas Assignment".[58] The ALJ concluded that these broadcasts covered both

[54] I.D. Findings, para. 12; United Ex. 1 at 1.

[55] I.D. Findings, paras. 42–43; United Ex. 19 at 2 and 7; tr. 1722–25.

[56] I.D. Findings, paras. 14–44.

[57] I.D. Conclusions, paras. 99–103(a). The ALJ cited, at para. 99, *In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant* (Docket No. 19154), 66 FCC 2d 419 (1977) (subsequent history omitted); *SRD Broadcasting, Inc.*, 57 FCC 2d 354 (1975); *Storz Broadcasting Company*, 58 FCC 2d 1333 (1975); *KSAY Broadcasting Company*, 47 FCC 2d 584 (1974); *Chicago Federation of Labor and Industrial Union Council*, 48 FCC 2d 1174 (Rev. Bd. 1974), *recon. denied*, 50 FCC 2d 559 (Rev. Bd. 1975).

[58] I.D. Conclusions, paras. 100–01. The list does not include "San Jose Rescue Mission," "State Capitol Reports" and "Guestitorials," which were discussed in the findings.

national and local matters adequately. Further, there was no evidence that United had ignored a strongly expressed problem of the community or had otherwise unreasonably exercised its programming discretion. The ALJ concluded that, even though many of the broadcasts were aired during potentially low audience periods, the programming still reached a sizable audience, as evidenced by the letters which United received from listeners commenting on the broadcasts.[59]

33. In its Exceptions, PCI claims that there is no finding as to the amount of public affairs programming broadcast during an average week. Nor do the findings consider the fact that United's local public affairs programming, with the exception of "San Jose Yesterday and Today," was introduced four months before the license term expired. PCI argues that testimony from the host of "You and Your Community" indicates that the program was erroneously classified as public affairs. Also, according to PCI, "San Jose Yesterday and Today" can only be considered 50% public affairs programming, and of its 139 scheduled broadcasts, only 89 broadcasts were actually presented. PCI argues that United's scheduling of public affairs programming is a relevant consideration, as the Board determined and contrary to the ALJ's conclusions.[60] PCI objects further to the ALJ's failure to adopt and/or respond to certain of PCI's Proposed Findings.[61] The Bureau's Reply generally affirms the ALJ's analysis under the this issue. United's Reply claims that PCI's Exceptions fail to meet the specificity requirement of Section 1.277 of the Commission's Rules,[62] and that PCI is merely complaining that the ALJ refused to adopt its version of the case.

34. PCI's objection to the lack of a specific finding on the amount of public affairs programming broadcast weekly is without merit. The Initial Decision actually provides more specific findings than the findings sought by PCI. The ALJ tabulated each broadcast of public affairs programming, so that the findings even reflect irregularities caused by schedule changes.[63] Furthermore, the adequacy of a

[59] I.D., Conclusions, paras. 102–03. In addition to the letters received from listeners, United introduced as evidence a survey conducted by Pulse, Inc., for the period June-September, 1974, which indicated that the station reached 1,300 people every quarter hour between midnight and 6:00 A.M. when station editorials were aired. I.D. Findings, para. 46; Joint Ex. 4 at 18–19.

[60] PCI notes that the Board, 59 FCC 2d at 1414, cited *KSAY Broadcasting*, 47 FCC 2d 584 (1974) and *New Mexico Broadcasting Co.*, 54 FCC 2d 126, *modified*, 56 FCC 2d 788 (Rev. Bd. 1975).

[61] This aspect of PCI's Exceptions, which refers to its earlier filed "Proposed Findings," fails to comply with the requirements of Section 1.277(a) of the Commission's rules.

[62] United cites *Burns- Rieke & Voss Associates*, 45 FCC 2d 264 (Rev. Bd. 1974) (subsequent history omitted); and *Harvest Radio Corp.*, 40 FCC 2d 685, *affirming* 39 FCC 2d 160 (Rev. Bd. 1973).

[63] I.D. Findings, paras. 15–38. We can discern the following figures from the ALJ's

licensee's responsive programming is not governed by quantitative standards.[64] The licensee has considerable leeway in the area of programming, and the bare assertion that a certain percentage of public affairs programming is not sufficient does not establish a *prima facie* case that a licensee has failed to serve the public interest.[65] The Commission will not interfere with a licensee's discretion in determining the amount, kind, and time periods during which public affairs and other informational programming should be presented absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise

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findings. Excluding program repeats and the three programs which the ALJ did not mention in the conclusions, ("State Capitol Report," "San Jose Rescue Mission," and the "Guestitorials") KBAY-FM aired a weekly average of 3 hours and 15 minutes of full-length public affairs programming and, also on a weekly basis, presented station editorials, local newscasts, public service announcements, and Free Speech Messages. The responsiveness issue against United, as added by the Board, specified public affairs programming, although the Board acknowledged that "news programming may be relevant to this examination." 59 FCC 2d at 1414. Pursuant to Section 73.1810(b) of the Commission's Rules, "public affairs programs" comprise a category separate from other program categories such as news, entertainment, religion and instructional programs. The ALJ considered the station's local newscasts under the responsiveness issue, and we note that this is permitted by Question and Answer 33 of the *1971 Primer*, 27 FCC 2d at 677–78. In doing so, the ALJ identified the local news items which were covered. I.D. Findings, para. 43. The other types of programs which the ALJ cited—station editorials, public service announcements, and Free Speech Messages—were also properly considered under the responsiveness issue. Although the *1971 Primer* indicates that responsiveness to community needs should be provided largely through programming rather than announcements or editorials, the *Primer* does recognize that public service announcements and editorials can serve as vehicles to address ascertained needs under certain circumstances. Questions and Answers 32, 62, and 65 of the *1971 Primer*, 27 FCC 2d at 674–77. The ALJ's findings list specific examples of community concerns which the announcements and editorials addressed. I.D. Findings, paras. 36–37 and n. 18.

[64] The Commission has repeatedly reiterated the inherent limitations of quantitative measurements of licensee performance. Answer 31 of the *1971 Primer*, *supra* n.44, 27 FCC 2d at 676–77, emphasizes that the licensee has considerable latitude in determining the proportion of time devoted to responsive programming. *E.g.*, *Radio Ohio, Inc.*, 38 FCC 2d 721, 738 (1973), *aff'd sub nom. Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320 (D.C. Cir. 1974); and *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 335 (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972), *reh. denied*, 466 F.2d 331. *See Amendment of Part 0 of the Commission's Rules - Commission Organization - with Respect to Delegation of Authority to the Chief, Broadcast Bureau*, 43 FCC 2d 683 (1973), *and Amendment to §0.281 of the Commission's Rules: Delegation of Authority to the Chief, Broadcast Bureau*, 59 FCC 2d 491 (1976), which sets forth procedural, not substantive, guidelines. *See also Broadcast Renewal Applicant*, 66 FCC 2d 419, 428 (1977), *aff'd sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978); and *Report and Order in the Matter of Deregulation of Radio*, 84 FCC 2d 968 (1981).

[65] *Storer Broadcasting Co.*, 41 FCC 2d 792 (1973). *See also Sonderling Broadcasting Corp.*, 62 FCC 2d 303, 306 (1976), *recon. denied*, 64 FCC 2d 731 (1977); *Lance Communications, Inc.*, 57 FCC 2d 1235, 1241 (1976); and *Storz Broadcasting Company*, 58 FCC 2d 1333, 1337 (1975).

unreasonably exercised its discretion in the station's overall programming.

35. In this regard the ALJ concluded there was no evidence that United had ignored a strongly expressed problem of the community or otherwise unreasonably exercised its programming discretion. The ALJ also concluded that United presented numerous programs which were responsive to community needs. As to PCI's argument that all the *local* programs, except "San Jose Yesterday and Today," were introduced during the last four months of the license period, we do not fault United for relying in part on network supplied programs. The Commission has recognized that licensees can rely on any programming which is responsive to local needs to serve its community of license.[66] Furthermore, United is entitled to receive some credit for programming which was introduced in August, 1974, since the programming was begun within the license period and PCI filed its competing application on November 1, 1974.[67]

36. PCI also complains that United was credited with two programs which were misclassified as public affairs programming. PCI's contention that half the programs on "San Jose Yesterday and Today" were historical and informational is simply a conclusory statement. PCI does not identify the particular programs in question or discuss why any of these alleged programs lack public affairs characteristics.[68] In addition, Section 73.1810(d)(1)(iv) of the Commission's Rules provides a broad definition of "public affairs programs."[69] For a series to be credited as public affairs programming, the Commission does not require that the entire broadcast and each individual program of a series have public affairs characteristics,[70] and the Commission grants licensees wide discretion in programming classification.[71]

37. United has provided specific examples of how crime and minority problems were treated on "San Jose Yesterday and Today." Many of the other topics treated on the program also fall within the

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[66] *WHEC, Inc.*, 52 FCC 2d 1079, 1085, *recon. denied*, 55 FCC 2d 687 (1975).

[67] *See Alabama Educational Television Commission*, 50 FCC 2d 461, 475–76 (1975); and *RKO General, Inc.*, 35 FCC 2d 100, 103 (1972) (subsequent history omitted).

[68] PCI merely refers to its earlier "Proposed Findings" which falls short of the pleading requirements of Section 1.277(a) of the Commissions Rules.

[69] This section defines public affairs programs (PA) as programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables, vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings and Congressional hearings. *See also* FCC Form 303, Section IV-A, at 2.

[70] It may be appropriate in some instances to give a series only partial public affairs credit. *E.g., Chicago Federation of Labor and Industrial Union Counsel*, 38 FCC 2d 417, 424 (1972) (subsequent history explained in Initial Decision), 54 FCC 2d 477 (ALJ 1975).

[71] *Lance Communications, Inc.*, 57 FCC 2d 1235, 1244 (1976).

broad category of public affairs. For example, according to Ray Blackmore, the show's host, programs were conducted on the problems of Mexican-Americans, civil demonstrations, pre-trial publicity, a proposed local sports arena, public landmarks, and retirement. Blackmore also conducted programs informing the public about community fund raising projects such as lighting for the police athletic league, housing for the Mexican Chamber of Commerce, and the City of Hope charitable organization.[72] We therefore conclude that the ALJ correctly considered "San Jose Yesterday and Today" as contributing toward the fulfillment of United's public affairs obligation.

38. We likewise affirm the public affairs classification of "You and Your Community." The show's host described her interview program as informative and educational. The Initial Decision lists the broadcast dates, program guests, and the interview subjects. Many of the topics pertained to community activities and events such as upcoming drama and music events, taping books for the blind, the area Children's Theater, and communications problems relating to the University.[73]

39. PCI also contends that United's scheduling of public affairs programming during the early morning hours rendered the programming ineffectual. We find, however, that United did not abuse its discretion in this regard, even though it relegated most of its informational programming to late evening and early morning hours.[74] We have traditionally hesitated to intrude upon licensee discretion in the scheduling of public affairs and informational programming, and licensees are accorded wide discretion in making such programming determinations.[75] Here United has demonstrated that its public affairs and informational programming reaches a sizable audience and has been reasonably effective in meeting its public interest obligations.[76] Thus, we find no basis for overturning the ALJ's conclusion that United's public affairs programming adequately serves San Jose's community needs.[77]

40. *Fairness Doctrine.* We previously found that the Fairness Doctrine issue should not have been designated against United.

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[72] *See* I.D. Findings, para. 34. We also note that the ALJ specifically listed the dates of each broadcast. I.D. Findings, para. 33. PCI offers no record support for its assertion that 50 of the 139 scheduled broadcasts never occurred.

[73] *See* I.D. Findings, paras. 25–26.

[74] *See* I.D. Findings, paras. 10–35. We note that licensees are expected to broadcast non-entertainment programs at times when they "reasonably could be expected to be effective." *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418, 445 (1976).

[75] Question and Answer 36 of the *1971 Primer*, 27 FCC 2d at 678–79, 687; *Sonderling Broadcasting Corp.*, 68 F 2d 752, 756 n. 9 (1978); *Storz Broadcasting Co.*, 58 FCC 2d 1333, 1336–39 (1975); and *SRD Broadcasting, Inc.*, 57 FCC 2d 275 (1975).

[76] *See* I.D. Findings, paras. 45–47.

[77] I.D. Conclusions, para. 103(a).

However, in light of the resolution of that issue, we conclude that the error is not of decisional significance. Moreover, we affirm the ALJ's finding that United did not violate its fairness obligations during the license term.[78] In addition to noting generally that United's public affairs programming dealt with numerous controversial issues, the ALJ specifically mentioned "San Jose Yesterday and Today" and "Community Focus" as two programs which dealt with local controversies. The ALJ discounted the fact that United did not employ a local news staff, since local news obtained from UPI's audio line was aired. In response to PCI's contention that United failed to provide access to local voices, the ALJ noted that Mr. Blackmore on "San Jose Yesterday and Today" represented a local voice.[79] The ALJ also concluded that PCI did not meet its burden of proceeding with the introduction of evidence; it presented no showing of a specific controversial issue of public importance or any specific viewpoint which was not adequately covered by United.

41. Throughout this proceeding PCI has placed great emphasis on United's alleged fairness violations. The allegations are predicated on PCI's apparent misunderstanding of the Doctrine's application. PCI's main objection to United's programming is that it rarely included "voices" of persons other than station personnel. In other words, United did not employ "actualities" (recorded voices of newsmakers), and it rarely invited people, aside from regular contributors, to participate on public affairs programs. PCI cites "San Jose Yesterday and Today" as a prime example, noting that the program host discussed controversial issues by analyzing the opposing viewpoints himself. The Fairness Doctrine, however, does not require broadcast licensees to air the "local voices" of spokespersons for different sides of a controversial issue. It does not confer a general right of access.[80] PCI's argument in this regard was addressed and rejected by the Commission in the *Fairness Doctrine Inquiry*. There, the Commission found the Fairness Doctrine is concerned with the discussion of controversial issues of public importance, and that an access proposal which placed its emphasis on speakers rather than on the dissemination of ideas is at cross purposes to the Doctrine.[81] Moreover, PCI has not demonstrated how the absence of any speaker or of a spokesman for a given viewpoint has rendered United's public affairs programming ineffective.

42. PCI's remaining exceptions illustrated further its misconception of the Commission's approach to the Fairness Doctrine. PCI

[78] I.D. Findings, paras. 48–49; Conclusions, paras. 104–06.

[79] The ALJ relied on *American Broadcasting Cos., Inc.*, 56 FCC 2d 275 (1975), *recon. denied*, 60 FCC 2d 509 (1976).

[80] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973).

[81] *Fairness Doctrine Inquiry*, 74 FCC 2d 163, 171 (1979).

asserts that the ALJ was required to determine how much air time was devoted to the presentation of controversial issues. PCI also would have us draw the conclusion that no cognizable amount of time was devoted to *local* controversial issues prior to United's program upgrading during the last four months of the license period. PCI claims that during the majority of the license term United's only local programming consisted of local newscasts, and "San Jose Yesterday and Today," the latter being the only full-length program, and it was aired Sunday mornings at 7:00 A.M. PCI also excepts to United receiving full credit for its local newscasts and "San Jose Yesterday and Today."

43. PCI would have the Commission, in essence, evaluate United's overall programming and declare that it does not satisfy the licensee's Fairness Doctrine obligations.[82] This has never been our approach to the Fairness Doctrine. The Commission requires a *prima facie* showing of specific prejudice to the community being served. In other words, it is incumbent upon the complaining party to specify a particular controversial issue of public importance that received inadequate coverage. Then, and only then, will the Commission act. The kind of programming scrutiny which PCI urges would unnecessarily involve this Commission in second guessing the editorial judgments of licensees in a manner inconsistent with our goals of deregulation. We believe that the procedure suggested by PCI would increase the scope of our administrative review of licensee fairness determinations without concomitant benefit.[83]

44. These principles have been enunciated in numerous cases and policy statements.[84] They bear repeating here merely to clarify PCI's apparent misunderstanding of the Doctrine. We conclude that PCI failed to show a *prima facie* Fairness Doctrine deficiency both at the time the issue was designated and subsequently at the evidentiary hearing.

45. *Promise versus Performance.* A promise versus performance

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[82] PCI's specific objections are also without merit. The mere absence of a separate staff for local news and reliance on a broadcast wire service, without any additional evidence, does not show a lack of service or deficiency of local news coverage. *Amalgamated Music Enterprises, Inc.*, 54 FCC 2d 761, 764 (1975). We have already concluded, that "San Jose Yesterday and Today" was properly credited as a public affairs program, and for the same reasons we conclude that the program represents a reasonable attempt to fulfill the licensee's fairness obligations. In addition, United was credited with other programming—editorials which regularly addressed local issues, news coverage of regional, state, national and international stories, "Washington Window,"—and "UN Week in Review"—all of which did air throughout the license term.

[83] *See Fairness Doctrine*, 89 FCC 2d 916, 926 (1982).

[84] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *1974 Fairness Report*, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976); *Fairness Doctrine Inquiry*, 74 FCC 2d 163 (1979); and *Fairness Doctrine*, 89 FCC 2d 916 (1982).

issue was designated against United based on evidence that United's 1971 renewal application promised 2 hours and 45 minutes of public affairs programming each week, whereas the composite week of United's 1971–74 program logs showed only one hour and 41 minutes of weekly public affairs broadcasts.[85] The ALJ found that "Guestitorials," "San Jose Yesterday and Today," and "State Capitol Report" were not broadcast during the composite week even though United has represented in its 1971 renewal application that these three programs would air weekly.[86]

46. At the evidentiary hearing United presented evidence to explain the discrepancies. Regarding the absence of the promised number of "Guestitorials",[87] the ALJ's findings note that United's solicitations for guest commentators went largely unheeded. "San Jose Yesterday and Today" was not broadcast during the composite week, but was frequently aired during the license period. As to why the program was not included in the composite week, United's President, George D. Snell, testified that the program's host was "probably out of town." Snell also conceded that the absence of "State Capitol Report" and "Guiestitorials" from the regular broadcast schedule should have been reported to the Commission.[88]

47. The ALJ concluded that United intended to perform as promised in its renewal applications and satisfactorily explained the deviations in its programming performance. ALJ found in fact that the promises were substantially performed, apart from several deviations which, in the ALJ's view, were beyond United's control. Underscoring United's overall programming, which adequately addressed community needs, the ALJ concluded that the station's public affairs programming during the license term reasonably

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[85] 59 FCC 2d at 1415.

[86] United's renewal application, dated August 23, 1971, proposed "State Capitol Report" (35 min.), station editorials (42 min.), "Guestitorials" (28 min.) and "Community Spectrum" as public affairs programs. In response to a Commission letter indicating that "Community Spectrum" was improperly classified, United amended its application on December 13, 1971 to reflect the addition of the following public affairs programs: "Washington Window" (30 min.), "UN Week in Review" (15 min.), and "San Jose Yesterday and Today" (15 min.). *See* I.D. Findings, para. 51; and *United Broadcasting Company (KBAY)*, 59 FCC 2d at 1415 n. 9.

[87] Under its "Guestitorials" proposal, United promised to air 28 mins. of guest editorials each week to allow listeners to air views on issues of their choice. The "Guestitorials" would be in addition to its promised schedule of station editorials (42 minutes each week). Only eight such programs, apparently running two minutes during each regular editorial time slot, were actually aired throughout the license period. *See* I.D. Findings, paras. 37, 41 and 51.

[88] *See* I.D. Findings, para. 53. The ALJ's findings disclose elsewhere that "State Capitol Report," which was renamed "Assemblyman Richard Hayden" during the latter part of license term, did air during the term, albeit irregularly, but sometimes as often as five nights a week.

conformed to the proposal set forth in United's 1971 renewal application.[89]

48. PCI's Exceptions under the promise versus performance issue repeat its earlier complaint that the ALJ made no finding as to the amount of public affairs programming which KBAY-FM actually broadcast. PCI also excepts to the ALJ's failure to note the percentage discrepancy between United's proposal and its programming performance, especially concerning United's promise to air 25% local news weekly as compared with the 13.8% local news aired during the week PCI monitored the station. PCI further claims that the reasons offered by United for not airing all of the promised public affairs programming are insufficient. The Bureau's Reply endorses the ALJ's findings and conclusions. United's Reply under the responsiveness issue also addresses PCI's Exceptions under the promise versus performance issue. In addition, United supports the ALJ's refusal to draw any inference from the one week PCI monitored KBAY-FM's programming.

49. PCI's Exceptions are without merit. In the area of promise versus performance, the Commission has not set minimum programming requirements to qualify for renewal. The licensee must show substantial compliance with its programming promises, or else justify any substantial variations. The Commission never intended prospective programming proposals to be absolutely binding, and, hence, insubstantial variations do not raise a question concerning the licensee's ability to operate in the public interest.[90] In evaluating a reduction in promised programming, the Commission considers the licensee's overall programming responses to ascertained community problems as well as the explanation given for deviations from the prior programming proposal.[91]

50. We have already determined that United's programming was responsive to ascertained community needs. Further, the difference

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[89] I.D. Conclusions, paras. 107–09. The ALJ relied on *Hubbard Broadcasting, Inc.*, 48 FCC 2d 22 517 (1974); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975) (hearing designation order); *Leflore Broadcasting Co. Inc.* (WSWG-AM), 46 FCC 2d 980 (1974) (hearing designation order).

[90] *West Coast Media, Inc.*, 79 FCC 2d 610, 614–15 (1980), *recon. denied*, 86 FCC 2d 331 (1981), *appeal docketed sub nom. West Coast Media, Inc.* v. *FCC*, No. 81–1548 (D.C. Cir., filed May 21, 1981); *Malrite of New York, Inc.*, 71 FCC 2d 241, 248 n. 7 (1979).

[91] Even when a licensee fails to broadcast promised programming, a favorable public interest finding can be made if the licensee intended in good faith to effectuate the proposal, but was prevented from doing so by factors beyond his control, such as financial inability. *Hubbard Broadcasting*, 41 RR 2d 979, 988 (1977).

in programming promised versus performed, as found by the Board, was based on United's composite week.[92] One of the programs, "San Jose Yesterday and Today," which did not air during the composite week and accounted for 15 minutes of the difference, was regularly broadcast during the license term. The other two programs accounting for the remainder of the difference were not broadcast regularly. United offered a reasonable explanation for its failure to air "Guestitorials" as promised. The series, which provided listeners with an opportunity to voice their opinions, was discontinued because of lack of listener response. "State Capitol Report" was presented sometimes as often as five times a week, but then aired infrequently during 1972 and subsequently was broadcast as a public service announcement within another progam.[93] In view of United's overall programming performance and responsiveness to ascertained needs, we conclude that United made a good faith effort to comply with its 1971 proposal. We need not address PCI's Exceptions alleging deficiencies in United's local news coverage since the promise versus performance issue as designated only focused on United's public affairs programming.

V. PCI'S BASIC QUALIFICATIONS

51. *Pleadings.* PCI generally excepts to all of the findings which resulted in its disqualification. PCI argues that it was denied a full and fair hearing because the ALJ refused to admit numerous Exhibits into evidence. PCI also objects to the rejection of its Amendment of July 27, 1977, as supplemented August 5, 1977, which specified a different tower on its proposed transmitter site.[94] PCI claims that the proffered testimony, together with this amendment, would have evidenced the feasibility of its staffing and technical proposals within the level of finances available. PCI also alleges that the ALJ applied unreasonable standards in deciding the transmitter site and staffing issues. In separate Replies, the Bureau and United argue that PCI's Exceptions are procedurally defective. On the merits, they support the ALJ's resolution of each of the designated issues.

52. *Procedural Matters.* Commission Rules require that Exceptions to an Initial Decision state with particularity any alleged

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[92] 59 FCC 2d at 1415. The "composite week" consists of seven different days of the week designated annually by the Commission in a Public Notice. *See* FCC Form 303, Section IV, p. IV.

[93] United conceded that this program change should have been reported to the Commission. *See* I.D. Findings, paras. 29–30.

[94] The record discloses that during the hearing on July 27, 1977, PCI indicated its intent to file a technical amendment. The written amendment was filed with the Commission on August 1, 1977 and supplemented on August 8, 1977.

material error and contain specific references to the hearing transcript.[95] In objecting to the ALJ's refusal to admit proffered testimony and exhibits into evidence,[96] PCI makes specific references only to Exhibits 3, 4, 5, 6, 12, and 24.[97] Further, PCI has provided us with only a conclusory argument that the exclusion of its proffered evidence resulted in the ALJ's adverse findings. PCI's Exceptions do not address the specific reasons which the ALJ gave for the evidentiary rulings, nor do they offer any justification for admitting the Exhibits in question. Because PCI's Exceptions lack the requisite particularity, the evidentiary objections may be deemed waived. However, in deference to PCI's *pro se* posture, we have chosen, despite the procedural deficiencies of its pleading, to make our own independent review of the record. Hence, we will review the ALJ's exclusion of those exhibits specifically mentioned by PCI, along with the ALJ's findings and conclusions under each of the disqualifying issues.

53. *Technical and Financial Qualifications.* The Review Board designated a technical issue concerning the adequacy of PCI's equipment proposal because PCI had stated that it may not have available the used equipment proposed in its application.[98] PCI thereafter stipulated that the proposed studio equipment specified in its application was no longer available. PCI never amended its application to show substituted equipment.[99] The ALJ concluded that without sufficient technical equipment to operate the proposed station, PCI lacked the requisite technical qualifications to be a Commission licensee.[100]

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[95] Section 1.276(a)(2) of the Commission's Rules, 47 C.F.R. §1.276(a)(2), and Section 1.277(a) of the Commission's Rules, 47 C.F.R. §1.277(a), the latter of which also provides, "any objection not saved by exception filed pursuant to this section is waived".

[96] PCI offered 63 exhibits as direct evidence. Of these, 34 exhibits were completely rejected and Exhibit 17 was partially rejected. PCI offered five rebuttal exhibits, of which two were rejected.

[97] PCI also notes that it was prepared to present affidavits and oral testimony from 16 named individuals, but offers no transcript or exhibit references and does not indicate the substance of any of these witness' testimony. Instead, PCI simply refers us to its "Offers of Proof" and a PCI Exhibit containing a "Motion for Review and Reclassification of Certain Rejected PCI Exhibits." This aspect of PCI's pleading is deficient under Section 1.277(a) of the Commission's Rules. *Chapman Radio and Television Company*, 19 FCC 2d 157, 183 n. 1 (1969). The Rule permits neither references to earlier filed pleadings which contain transcript citations nor incorporation by reference of earlier filed pleadings which contain those references. *Nuance Corp.*, 47 RR 2d 1405 (Rev. Bd. 1980). Although we have made allowances for procedural deficiencies in PCI's pleadings elsewhere, PCI was previously given an opportunity to correct these deficiencies and affording PCI an additional opportunity to correct its pleading would unduly delay the final resolution of this proceeding.

[98] 58 FCC 2d at 1354–55.

[99] Tr. 476–79 and 2559; PCI Ex. 20; United Ex. C.

[100] I.D. Findings, paras. 73–74; Conclusions, paras. 124–25.

54. The financial issue was designated to determine whether PCI's cost estimates were sufficient to construct the station and operate it for the first three months, and whether PCI had sufficient funds (excluding revenues) available to meet these costs.[101] PCI estimated $26,050 as the total cost for construction and for the first three month's operation. A total of $12,700 was allocated for construction costs, and $13,350 for the first three month's operating expenses.[102]

55. The ALJ concluded that PCI's construction cost estimates did not consider such items as program origination equipment, acquisition of a transmitter site,[103] or possible legal fees.[104] Moreover, PCI's antenna system estimate was based upon a three-bay antenna, whereas its application proposed a six-bay antenna.[105] The ALJ also concluded that PCI was relying upon a proposed studio location for the unrealistic amount of $30 per month rent with no reasonable

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[101] *See generally*, I.D. Findings, paras. 64–70; Conclusions, paras. 117–120. Instead of the one-year requirement established in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965), the Board applied the three-month standard for applicants seeking to replace a station with an established record of advertising revenues. 58 FCC 2d at 1351. In recent actions the Commission has relaxed the first-year expense requirement to ninety days for all applicants seeking new radio and television construction permits and applicants seeking to acquire broadcast stations through a license assignment or transfer of control. *New Financial Qualifications Standard for Broadcast Assignment and Transfer Applicants*, 49 RR 2d 1291 (Public Notice, released June 23 1981); *New Financial Qualifications Standard for Broadcast Television Applicants*, 72 FCC 2d 784 (Public Notice, released May 11, 1979); and *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (Public Notice, released August 2, 1978) Significant changes concerning the financial reporting requirement have also been made to Form 301-Application for Construction Permit for a Commercial Broadcast Station. The Commission no longer requires a detailed itemization of projected expenditures and sources of funds or the submission of a balance sheet, yearly income statement, and other documentation. The revised application consists of two questions that can be answered yes or no and provides Commission staff with the option to request additional information if circumstances warrant. *Revision of Application for Construction Permit for Commercial Broadcast Station* (FCC Form 301), 50 RR 2d 381 (1981). It should be noted, however, that this streamlined application Form does not modify the underlying substantive requirement—the financial ability to construct and operate the proposed facility for three months.

[102] Tr. 2475–76; PCI Ex. 2.

[103] Tr. 2486.

[104] According to David McNeil, PCI President and acting technical director, the category "legal fees, public notice" includes registration or business taxes and legal fees that may be required prior to going on the air. Tr. 2487. McNeil testified that PCI hopes to obtain volunteer counsel. However, none had been secured and no additional funds were set aside in the event volunteer counsel can not be secured. Tr. 2563.

[105] There is no record evidence as to the cost of a six-bay antenna. Tr. 2549–50.

expectation of the location's availability or that the rent will be $30 per month at the time of a grant.[106] PCI further made no showing that the used equipment, on which its estimates were based, was available and it presented no alternate financial plan.[107] Finally, PCI admitted at the hearing that sufficient funds were not allocated for anticipated operating expenses.[108]

56. PCI proposed to meet estimated construction and the first three-months' operating costs by relying on unsecured personal loans from nine individuals totaling $39,000.[109] In his conclusions, the ALJ noted that the financial statements of these individuals reflect liquid assets of only $21,200, which is insufficient to support "the promised loan of $39,000."[110] The ALJ concluded that PCI did not have sufficient funds available to meet even its underestimated costs.

57. In its Exceptions, PCI argues that the ALJ improperly rejected exhibits showing the availability of used and alternative equipment. We have considered those exhibits to which PCI specifically refers (Exhibits 3, 4, 5, 6 and 12), and Exhibit 16, which was also offered in connection with the technical and financial issues. We conclude that the ALJ's evidentiary rulings were correct and affirm his ultimate conclusions on both issues.

58. Several of the exhibits in question were rejected because they did not conform to PCI's proposal and were speculative.[111] From the outset of this proceeding, the ALJ repeatedly explained the require-

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[106] Tr. 2562.

[107] All of PCI's equipment-related estimates were based upon the proposed acquisition of used equipment. Tr. 2553–54.

[108] David McNeil conceded that operating costs would amount to "a couple thousand" more than the proposed $13,350. Tr. 2476, 2552, 2563.

[109] PCI Ex. 2 and 2A.

[110] *See* I.D. Findings, para. 67–70; Conclusions, para. 119–20. In his findings, the ALJ discounted testimony regarding a $1,000 pledge from Florence Poyadue, because no financial statement or balance sheet was submitted and PCI's application was never amended to reflect reliance on this loan. I.D. Findings, n. 25. For the proposition that the Commission requires evidence of sufficient liquidity to support a promised loan, the ALJ cited *Viking Television, Inc.*, 16 FCC 2d 1018 (1969); *cf. La Fourche Valley Enterprises, Inc.*, 30 FCC 2d 539 (Rev. Bd. 1971) (enlargement of issues); and *Rocket Radio, Inc.*, 65 FCC 2d 589 (Rev. Bd. 1977) (enlargement of issues).

[111] PCI Ex. 3 is an affidavit of Jeremy D. Lansman giving his background as an engineer and stating relative costs of certain technical equipment. The Exhibit was rejected as speculative because it was not based on PCI's application. For example, Lansman represented that PCI would be able to rent telephone lines rather than use a broadcast RF link in the SFL band as originally proposed, although he did not give any cost for telephone line rental. Tr. 387–395. PCI Ex. 4 is another statement from Lansman showing the costs of various used equipment, including some program origination equipment, which might comprise a "possible inexpensive station." The Exhibit was also rejected as speculative and unrelated to PCI's proposal. Tr. 395–400. PCI Ex. 16 is a letter from Communications Systems, Inc., proposing selling prices of various equipment. The list also includes various recording and stereo equipment. In addition

ment that PCI had to present a firm proposal, and not vague plans for the station's operation.[112] These Exhibits were rejected properly[113] on grounds of variance and vagueness. Rejection of two other Exhibits as hearsay was also proper[114] and Exhibit 12 was properly rejected as lacking in relevance to PCI's proposal.[115]

59. Furthermore, admission of the Exhibits in question would not have altered the findings and conclusions under the technical and financial issues. The critical facts with respect to the technical issue were that the used equipment proposed in PCI's application was no longer available, and that PCI never amended its application to specify any substituted equipment. An applicant is required to show that the essential items of equipment are either possessed or reasonably available at a cost which would not impair its financial qualifications.[116] Although PCI may have intended to obtain comparable used equipment, it is not sufficient simply to allege that comparable equipment is available.[117] PCI's testimony and proffered Exhibits refer to the availability of *various* used equipment, but PCI never filed an amendment showing a specific alternative proposal or the cost of used equipment comparable to those items specified in its application.[118] Such an amendment is required under Section 1.65 of the Commission's Rules.[119] We thus conclude, as the ALJ did, that

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to stating that PCI already had a proposal of record, the ALJ refused to accept the Exhibit as an amended proposal because, among other reasons, PCI's Board of Directors never formally approved the equipment list. Tr. 448–54.

[112] Tr. 45–46.

[113] *Norman Broadcasting Co.*, 56 FCC 2d 1046 (Rev. Bd. 1975) (an applicant can not present evidence of two proposals).

[114] *See* Administrative Procedure Act, 5 U.S.C. §556(d). PCI Ex. 5 is a typed list of FM permits granted in 1974 and 1975, showing the successful applicant's construction and operating costs. The list was allegedly compiled from Broadcasting Magazine. The ALJ rejected the Exhibit on hearsay grounds. Tr. 400–402. PCI Ex. 6 is an affidavit of David McNeil citing the price ranges of various equipment which he found upon examining the Spring 1975, catalogue of the Broadcast Equipment & Supply Co. of Bristol, Tennessee. The Exhibit was rejected as hearsay. Tr. 403–405.

[115] Exhibit 12 contains a statement from Lorenzo W. Milam concerning, *inter alia*, the costs of establishing and operating several "community" broadcast stations and his estimate for PCI's proposal. The ALJ noted that Mr. Milam's statement failed to establish his familiarity with PCI's proposal, and that there was no evidence that the costs for the other stations' operations would be similar to the applicant's. Tr. 426–34.

[116] *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011, 1021 (Rev. Bd. 1969).

[117] *WVOC, Inc.*, 32 FCC 2d 765, 767 (Rev. Bd. 1971) (enlargement of issues).

[118] Tr. 2559–60.

[119] PCI was apprised of the procedure for filing a technical amendment. In an earlier pleading PCI requested leave to report that the proposed equipment was no longer available. By Order, FCC 77M-15, released January 6, 1977, the ALJ dismissed the pleading without prejudice, citing the Bureau's comments which explain why PCI's pleading failed to conform to Section 1.65 of the Commission's Rules. *See also* Tr. 45–50. Elsewhere in connection with its financial qualifications, PCI filed an amendment which was accepted. PCI Ex. 2; Order, FCC 77M-539, released March 18, 1977.

PCI failed to make the minimal showing required under this issue and that it lacks the requisite technical qualifications to be a Commission licensee.

60. Concerning PCI's financial ability to construct and operate its proposed station, we concur in the ALJ's conclusion that PCI's estimated costs for construction and the first three months of operation are unrealistically low. The $26,050 estimate does not reflect costs for the proposed six-bay antenna, possible legal fees, acquisition of a transmitter site, program origination equipment to replace the used equipment proposed in PCI's application (valued at $5,855.15), and a realistic rental for the studio location.

61. Moreover, PCI does not have the funds available to meet even its underestimated budget of $26,050. PCI relies upon separate pledges from nine individuals which total $39,000. A $1,000 pledge from Florence Poyadue must be discounted because it is not supported by a financial statement or balance sheet.[120] According to the financial statements for the remaining pledges, however, only $21,200 in net liquid assets is available. Because the liquid assets available to PCI fall short of meeting its proposed budget and the proposed budget has been underestimated, we must conclude that PCI has not demonstrated its financial qualifications.[121]

62. *Transmitter Site Availability.* PCI proposed the same transmitter site currently used by KBAY-FM on the tower of Station KNTV which is located on the summit of Mount Loma Prieta. Alternatively, PCI proposed to add another antenna to this tower. However, as the ALJ found, the KNTV tower is owned by Gill Industries, licensee of Station KNTV, and Gill Industries has leased space to United. The United lease extends to 1985 with an option available to renew for another ten years. The Vice-President and General Manager of KNTV (Robert M. Hosfelt) testified that the KNTV tower already is utilized to its maximum wind loading capacity, and, hence, he would not accept PCI's application for space. According to United's President, George Snell, United would still be in the communications business even if it is unsuccessful in this case, and it would not lease space to PCI because the company is a bad credit risk.[122] Based on the foregoing, the ALJ concluded that PCI had no reasonable assurance of the availability of its proposed transmitter site and its application did not propose an alternate site.[123]

63. In light of recent Commission precedent, we shall reverse the

[120] *See* n. 110, *supra.* FCC Form 301, Financial Qualifications of Broadcast Applicants, No. 4b, requires each lender to submit either a balance sheet or financial statement.

[121] *Rocket Radio, Inc.*, 65 FCC 2d 589 (Rev. Bd. 1977).

[122] I.D. Findings, paras. 71–72; tr. 1156, 1158–59, 1180–81, 1859–61, 2155–56, 2161–63; United Ex. A at 1–2; PCI Ex. 17 at 2.

[123] *See* I.D. Conclusions, paras. 121–23.

ALJ's disqualification of PCI on this ground. Preliminarily, however, we note that the ALJ's findings and conclusions under the issue followed existing case law,[124] and also that the ALJ properly denied PCI's last minute attempt to amend its site proposal.[125] Nonetheless, after release of the Initial Decision and while this case was pending on appeal, the Commission overturned the procedural practice followed in designating transmitter site issues—*i.e.*, *pro forma* designation of an issue against a challenger who lists the site of an incumbent opponent and is then denied permission to use the site. Under the new policy enunicated in *George E. Cameron Jr. Communications*,[126] a site availability issue will not be designated where a challenger lists the site of a renewal applicant, even if the incumbent licensee refuses to sell or lease the site. The Commission specifically stated, "during the comparative proceeding . . . we will not countenance an existing licensee's assertion that it will deny use of its site to any other party even if its own application is denied."[127] Recently, *Belo Broadcasting Corp.*, held that the new standard applied retroactively to a non-final Commission proceeding.[128]

64. For the reasons articulated in *Belo*, we are persuaded that PCI should have the opportunity to proceed under the Commission's new policy. In this case the Order specifying a site availability issue against PCI presents no problem under *Cameron*, since the issue was added for reasons other than the incumbent's refusal to allow use of its site.[129] However, at the hearing PCI presented evidence of its

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[124] The ALJ relied on *Ken Stephens*, 53 FCC 2d 383 (1975). The ALJ also cited two Review Board Orders adding site issues, *Belo Broadcasting Corp.*, 42 FCC 2d 1011 (1973) (subsequent history omitted), and *Alabama Citizens for Responsive Public TV, Inc.*, 62 FCC 2d 755 (1977), for the proposition that an applicant challenging a licensee can reasonably assume that a renewal applicant, whose application has been denied, would be receptive to an offer to purchase its transmitter and antenna sites, "absent some contrary indication or unusual circumstances."

[125] PCI did not attempt to amend its application to specify an alternative site until after the evidentiary hearings were completed. Its Motion for Leave to Proffer a Technical Amendment filed August 1, 1977, as supplemented August 8, 1977, was rejected as untimely. Memorandum Opinion and Order, FCC 77M-1597, 41 RR 2d 921, released September 15, 1977.

[126] 71 FCC 2d 460 (1979).

[127] 71 FCC 2d at 467 (1979). This new approach seeks to avoid inquiry into the motives of an incumbent licensee for denying use of its site. The intent is to hold in abeyance all considerations relating to a challenger's transmitter site until after the comparative evaluation. If the challenger is found to be comparatively superior and continues to specify the same transmitter site, it still must obtain the site and contruct within certain time limits. The incumbent may present evidence concerning the site's availability at the time the Commission considers any modification of the proposed transmitter site. *Belo Broadcasting Corp.*, 88 FCC 2d 922 (1981) (petition for recon. granted in part).

[128] 88 FCC 2d 922 (1981) (petition for recon. granted in part). In *Belo* the policy change occurred after affirmance of the Initial Decision and while a petition for reconsideration was pending.

[129] 58 FCC 2d at 1351–52.

proposal to use the site currently used by KBAY-FM, and United's refusal to rent to PCI was the basis for the ALJ's findings and conclusions on the issue. The clear import of *Cameron* and *Belo* requires us to conclude that PCI's disqualification under this issue must be reversed.

65. *Staffing.* The Board added a staffing issue "[t]o determine whether the staff proposed by Public Communicators, Inc. is adequate to effectuate its proposed operation." PCI proposed to broadcast 168 hours per week (24 hours daily), without network affiliation.[130] It proposed operation includes extensive public affairs programming and local news coverage.[131] To effectuate the station's programming, PCI will have four paid staff persons, working full-time: a sales director, an engineer, a news director, and an "access" director.[132] PCI also proposes to have a full-time station manager, although the individual designated for the position will not be paid during the first three months of station operation.[133] PCI also relies upon pledges of volunteer time from 13 persons, totaling 143 hours of

[130] 58 FCC 2d at 1357–58.

[131] Tr. 2509.

[132] PCI's application indicates that 17.3% of total air time will be devoted to news, public affairs programming, and all other programs, exclusive of entertainment and sports. In Exhibit 11 to the application, PCI states that its news programming will consist of 50% local news and 15% regional news. According to David McNeil, President of PCI, the locally produced public affairs programming includes (tr. 2511–15, 2517, 2519, 2522–23, 2530):

Program	*Length*	*Frequency of Broadcast*
"Youth Forum"	30 min.	Once per week
"Consumer Report	5 min.	12 times per week
"Women's Program	30 min.	Once per week
"Mini-Series"	10 min.	10 times per week
"City Council"	2 min.	Twice daily
"Service Awareness Spots"	5 min.	Twice daily
"Health Program"	5 min.	6 times per week
"Citizens Editorials"	2 min.	3 times daily
"Free Speech Messages"	1 min.	Several times daily
"You and the Law"	10 min.	Once per week
"Children's Hour"	1 hr.	Once per week

McNeil also estimated the approximate number of volunteers, working 5–10 hrs. per week (tr. 2530), which would be required for each program over the course of a year: "Youth Forum" and "Consumer Report will require "hundreds of volunteers" (tr. 2517); "Women's Program," "Mini Series," "Health Program," "You and the Law" and "Children's Hour" will each require approximately two volunteers a week; and the paid station staff will work on the "Service Awareness" and "City Council Spots" (tr. 2522–23).

[133] Tr. 2531. All of the paid staff will be required to work with the volunteers. The "access" director, station manager and news director are primarily responsible for station programming. The "access" director is responsible for coordinating the station volunteers. Tr. 2527–28, 2530–31. The staffing plans do not provide for a paid staff member to be at the station during all its operating times. Tr. 2534.

volunteer time per week. The ALJ's findings detail the amount of time each volunteer has pledged, areas of volunteer interest, and other commitments on the volunteer's time.[134]

66. The ALJ concluded that many of the volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time. According to the ALJ, PCI's statement that "the complete list of volunteers . . . will have to wait until the awarding of the license" amounted to mere conjecture. The ALJ concluded that PCI's staffing was so minimal as to be "inherently incapable of effectuation."[135]

67. PCI argues that an unreasonable standard was applied to the staffing issue, since an applicant which relies on volunteers to operate its station cannot be expected to establish which named individuals will be available at unspecified future dates. PCI also objects to exclusion of Exhibit 12 which contains a statement from Lorenzo W. Milam showing that he was able to operate successfully a broadcast station with 125 volunteers. The Bureau supports the ALJ's findings and conclusions concerning the staffing issue.

68. We previously ruled that the ALJ's exclusion of Exhibit 12 was proper.[136] The Commission has held that assertions regarding another station's operations have little evidentiary value, absent a showing that those operations are similar to the applicant's.[137] Since Mr. Milam's statement did not indicate that the operations of other "community" stations were comparable to PCI's operation and offers no evidence concerning the availability of PCI's volunteer staff, Exhibit 12 has no probative value with respect to the staffing issue.

69. We do not agree, however, with the ALJ's conclusions under the staffing issue. In designating a staff adequacy issue,[138] the Board described PCI's staffing plan as unrealistic "in light of the extensive public affairs programming and local news coverage proposed." The Board noted two deficiencies in PCI's application. PCI failed to indicate what duties and responsibilities would be assigned to each of the four paid full-time employees, and PCI failed to provide any assurance that its proposed volunteer help will actually be available.

70. At the hearing PCI presented evidence which responded to the two deficiencies noted by the Board. The full-time staff will consist of a station manager (volunteer), "access" director, news director, engineer, and sales director. The first three will be responsible for programming. The "access" director will be in charge of volunteer programming, the news director will supervise news

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[134] I.D. Findings, paras. 78–88; PCI Ex. 23.

[135] The ALJ cited *United Broadcasting Industries, Inc.*, 49 FCC 2d 313 (1974), and *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (1974). I.D. Conclusions, paras. 126–28.

[136] N. 115 *supra*.

[137] *Martin Lake Broadcasting Co.*, 23 FCC 2d 721 (1970); *United Broadcasting Industries, Inc.*, 49 FCC 2d 313 (Rev. Bd. 1974).

[138] 58 FCC 2d at 1357.

production, and the station manager will oversee all programming.[139] Local news production will be based upon wire services and news gathering by approximately ten volunteers a week.[140] David McNeil, PCI's President, offered testimony explaining how volunteers would assist in the production of the locally originated public affairs programming.[141] For example, the ALJ's Conclusions, at para. 127, note that two weekly programs will require "hundreds of volunteers" over the course of the year. PCI's plan is not as unrealistic as these volunteer figures alone might suggest. According to McNeil's testimony, one of the programs, "Youth Forum", would be broadcast live each week. A team of students from an area high school would be responsible for each weekly program. "Consumer Report, the other program requiring hundreds of volunteers annually, would involve two volunteers in the weekly preparation of 5 minute programs. The twelve "Consumer Report" weekly broadcasts would not involve 12 separate programs, but rather three to six programs rotated during the course of the week. Area consumer organizations, activists, and ordinary consumers would be invited to develop the programs.

71. In response to the second problem noted by the Board, PCI provided assurance that volunteer assistance would actually be available. PCI presented pledges from 13 individuals, totaling 143 hours of volunteer time per week.[142] It would have been preferable, certainly, if PCI had presented an announcer-operator schedule for its proposed 168 hours of station operation and also the precise amount of time volunteers would devote to their designated areas of interest.[143] However, we believe that PCI has met its burden of proof under the staffing issue as designated. As stated in *Bisbee Broadcasters, Inc.*,[144] ". . . the Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff." (footnote omitted)

72. PCI's proposed staff of paid full-time employees and complement of volunteers, which includes a present commitment of 143 volunteer hours per week, appears reasonable to effectuate its

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[139] Tr. 2527–32.

[140] Tr. 2528–30.

[141] N. 132 *supra*.

[142] PCI Ex. 23.

[143] Each proposed volunteer filled out a "volunteer pledge form." The form includes a list of areas that require volunteers. Each volunteer checked the activities in which he or she was interested. None of the volunteers had given any thought to the precise amount of time that would be allocated to each category. Tr. 2059, 2077–78, 2132.

[144] 48 FCC 2d 291, 292–93 (Rev. Bd. 1974), *application for review denied*, 51 FCC 2d 8 (1975).

proposed. The Commission has accepted staffing proposals in the past that were similarly demanding.[145] And we see no reason to penalize PCI simply because its staffing proposal relies in part on volunteers.[146] Quite the contrary, PCI's specific plan for involving volunteers and community organizations in the station's programming offers added assurance that it will be able to effectuate its programming proposal.

73. Furthermore, we reject the ALJ's conclusion (and related findings), at para. 127, that "many of these volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time. . . ." The most significant pledge is from Lawrence Bensky who volunteered his time, without pay, to serve as full-time station manager for the first three months. The ALJ's findings indicate that at the time of the hearing Bensky was unemployed and actively seeking employment. Bensky testified that he may not be available to serve as station manager if he were to obtain employment.[147] However, the record discloses that Bensky expressed a present intention to contribute his time, and we believe this is sufficient. The Commission cannot reasonably expect a more binding volunteer commitment, especially given the length of time involved in many comparative proceedings.[148] When called to testify, Bensky affirmed his willingness to contribute time if PCI obtained the license "now." He simply indicated that because of the length of time already involved in this proceeding, he could not remain unemployed on the expectation that PCI would be the successful applicant at some indefinite future date.[149]

74. The pledges of the other volunteers were limited only by other demands on their time, such as full-time employment, family responsibilities, or commuting distance. Each of these volunteers made a good faith pledge, and we find nothing in the record which

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[145] In *Crosthwait*, 79 FCC 2d 191, 199–201 (1980), on remand, the Commission declined to add a staffing issue. The FM applicant proposed a staff consisting of himself and his wife, who would each work full-time, and two part-time employees. He planned to broadcast 112 hours per week, including 12 hours and 10 minutes of news (60% local), and without network affiliation. *See also Mace Broadcasting Co.*, 27 FCC 2d 630 (ALJ 1971), where the ALJ accepted as adequate a staffing proposal of five persons to effectuate an AM station operation consisting of a 125 hour broadcast week and 12.2% live programming.

[146] In fact, several of the volunteers have broadcast and/or engineering experience. Steven A. Burt (10 hours pledged) holds a second class FCC operators license and is working toward a first class license; he has also done radio announcing and programming. Cathell Toscan (3 hours pledged) is a production assistant at a television station. Charles Sweeney (10 hours pledged) is currently music editor for Zodiac News Service, a national news service, and has been involved in broadcasting since 1963. PCI Ex. 23.

[147] I.D. Findings, para. 81.

[148] *Southwestern Bell Telephone Company*, 47 RR 2d 561, para. 12 (Rev. Bd. 1980), *application for review denied*, FCC 81–233, released May 11, 1981.

[149] Tr. 2031–32.

would compel us to hold otherwise. Nor does the record contain any evidence that the pledge limitations would actually preclude the volunteers' commitments.[150]

75. To the contrary, at the hearing the volunteers who testified offered reasonable explanations of how their volunteer time would fit into their regular schedules. We need only cite two examples. Florence M. Poyadue pledged five hours a week; areas of interest noted were secretarial work, announcing, program production, and community and access outreach. Although she works approximately 20 hours a week as a nurse educator and has several small children,[151] she was certain that she could accommodate her schedule to meet the five hour commitment to the station. She testified that she would either go to the station for a couple of hours a day or for five hours at one time, or else do secretarial work at home in the early evening while her children are asleep.[152] The ALJ's findings also underscore that Mary Jo Foote lives an hour from San Jose.[153] However, she has pledged two hours of volunteer time per week in the areas of public relations and news, and neither area requires her presence at the station in San Jose.[154]

76. For all the foregoing reasons, we conclude that there is a reasonable likelihood that PCI could effectuate its proposed operation with the staff proposed and, hence, its staffing proposal is acceptable. However, this error along with the ALJ's treatment of the site availability issue, are not of decisional significance since PCI is disqualified on other grounds.

77. *Ascertainment.* Recently, in its *Report and Order in the Matter of Deregulation of Radio*,[155] the Commission abolished the formal ascertainment requirements for all commercial radio stations. There, the Commission also stated that the new policy, as of its April 3, 1981 effective date, "should apply to pending applications for

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[150] In *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (Rev. Bd. 1974), the Board overturned the ALJ's rejection of the Wrye staffing proposal. Mr. and Mrs. Wrye proposed to operate an FM station 119 hours per week, with a studio in their home. Both Mr. and Mrs. Wrye proposed to work 40 hrs. per week, respectively at the station (Mr. Wrye was also employed full-time with the U.S. Army and Mrs. Wrye was a part-time student and had family responsibilities). Wrye planned to hire four part-time employees, each working 15 hours per week, and a non-salaried commissioned salesperson to sell advertising. The Board, concluding that there was no reason to believe Mr. Wrye could not adhere to a 16 hour a day work schedule, quoted from the Bureau's proposed findings and conclusions: ". . . since Wrye is fully cognizant of the burdens of his undertaking, and is nevertheless confident he will be able to fulfill his commitments, his testimony in this respect should not be brushed aside unless compelling evidence to the contrary is available." 48 FCC 2d at 293.

[151] *See* I.D. Findings, para 87.

[152] Tr. 2280.

[153] I.D. Findings, para. 87.

[154] Tr. 2234–36.

[155] N. 13, *supra*.

new facilities that have been desiganted for hearing at all stages of the hearing process." Hence, in accordance with the policy enunciated therein and its retroactive application, the ascertainment issue against PCI must be deleted.

78. Although we have resolved the site availability and staffing issues in PCI's favor and deleted the ascertainment issue, we concur with the ALJ's resolution of the financial and technical issues. We conclude therefore that PCI is not qualified to be a Commission licensee. Having determined that United is fully qualified, we conclude that the public interest will be best served by granting United's renewal application and denying PCI's application for a new station.

79. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Intervene as *Amicus Curiae* and to File Brief filed by American Civil Liberties Union, Santa Clara Valley Chapter, on January 26, 1982, IS DENIED; that ACLU's accompanying Brief IS ACCEPTED as an *Amicus Curiae* brief; and that the Motion to Strike, filed March 10, 1982, by United Broadcasting Company IS DENIED.

80. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues filed by United Broadcasting Company on January 23, 1980, IS DISMISSED as moot; that the Motion for Leave to Amend Application filed by Public Communicators, Inc., on February 20, 1980 IS GRANTED and the accompanying amendment IS ACCEPTED; and that the Motion to Amend Application filed by United Broadcasting Company on February 8, 1982 IS GRANTED and the accompanying amendment IS ACCEPTED.

81. IT IS FURTHER ORDERED, That the Exceptions filed November 8, 1978, by Public Communicators, Inc., and the Limited Exceptions filed September 15, 1978, by United Broadcasting Company, ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED.

82. IT IS FURTHER ORDERED, That the Initial Decision of Administrative Law Judge James K. Cullen, Jr., FCC 78D-51, released July 26, 1978 IS MODIFIED to the extent indicated herein and that the application of United Broadcasting Company for renewal of its license for station KBAY-FM, San Jose, California (File No. BRH-1402) IS GRANTED, and the mutually-exclusive application for a construction permit (File No. BPH-9229), filed by Public Communicators, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

FCC 78D-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
UNITED BROADCASTING COMPANY (KBAY) San Jose, California	Docket No. 20611 File No. BRH-1402
For Renewal of License	
PUBLIC COMMUNICATORS, INC. San Jose, California	Docket No. 20612 File No. BPH-9229
For Construction Permit	

Appearances

Norman E. Jorgensen, Esquire and *John G. Johnson, Jr.*, Esquire, on behalf of United Broadcasting Company (KBAY); *Phil Jacklin*, *Dick Cantu*, *David McNeil*, *Len Krimerman* and *James White*, on behalf of Public Communicators, Inc.; and *Barbara A. Kreisman*, Esquire, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JAMES K. CULLEN, JR.

(Issued: July 13, 1978; Released: July 26, 1978)

Preliminary Statement

1. On July 31, 1974 United Broadcasting Company (United) filed its application for renewal of United's FM radio station KBAY license, San Jose, California. On November 1, 1974 Public Communicators, Inc. (PCI) filed its mutually-exclusive application for construction permit, specifying the facilities currently used by KBAY. By *Order* released October 29, 1975, the Chief of the Broadcast Bureau (Bureau) designated the two mutually-exclusive applications for comparative hearing on the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

See 40 Fed. Reg. 51501 (November 5, 1975).

2. By *Memorandum Opinion and Order* released April 23, 1976, 58 FCC 2d 1346, the Review Board enlarged the issues in this

proceeding to include the following additional issues regarding the basic and comparative qualifications of PCI:

(a) To determine with respect to the application of Public Communicators, Inc., the reasonableness of its estimated costs to construct and operate its proposed station for a period of three months; whether it will have available sufficient funds to meet those costs; and whether, in view of the evidence adduced, Public Communicators, Inc. is financially qualified to construct and operate its proposed station.

(b) To determine whether Public Communicators, Inc. has reasonable assurance of the availability of its proposed transmitter site.

(c) To determine whether Public Communicators, Inc. possesses sufficient and suitable technical equipment to operate its proposed station and, if not, the effect thereof upon the applicant's technical qualifications.

(d) To determine whether the staff proposed by Public Communicators, Inc. is adequate to effectuate its proposed operation.

(e) To determine whether Public Communicators, Inc. has maintained its public file at the location specified by it as required by Section 1.526 of the Commission's Rules, and, if not, the effect on its comparative qualifications to be a Commission licensee.

(f) To determine the efforts made by Public Communicators, Inc. to ascertain the public's needs and interests, in the following respects:

(1) whether PCI interviewed community leaders in areas beyond the proposed city of license;

(2) whether PCI's demographic data is sufficient with respect to governmental organizations, public service organizations, and civic and educational activities in San Jose, and if so, whether PCI adequately interviewed representatives of these organizations and activities; and

(3) whether PCI properly listed the ascertained community problems in San Jose; and

(4) whether PCI's survey of the general public included consultations with a random sample of members of the general public, and whether in light thereof, it has complied with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*.

(g) To determine whether the application of Public Communicators, Inc. was properly certified and executed by a principal thereof in accordance with FCC requirements,

and in light of the evidence adduced, whether Public Communicators, Inc. possesses the requisite and/or comparative qualifications to be a Commission licensee.

The Review Board placed the burden of proceeding with the introduction of evidence under issues (b) and (g) on United. The burden of proceeding under Issues (a), (c) and (f) was placed on PCI. The burden of proof under issues (a) through (g) was placed on PCI.

3. *By Memorandum Opinion and Order* released July 13, 1976, 59 FCC 2d 1412, the Review Board again enlarged the issues in this proceeding to include the following additional issues regarding the basic and comparative qualifications of United:

(1) To determine whether United Broadcasting Company (KBAY) adequately served the community's needs with respect to public affairs programming in the 1971–1974 license term.

(2) To determine whether United Broadcasting Company (KBAY) has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during the past license term, 1971–1974.

(3) To determine whether United Broadcasting Company's public affairs programming of Station KBAY reasonably conformed during the 1971–1974 license term to its proposal as set forth in its 1971 renewal application.

(4) To determine whether United Broadcasting Company provided equal employment opportunity at Station KBAY to Spanish-surnamed persons.

(5) To determine, in light of the evidence adduced under the above issues, whether United Broadcasting Company has the requisite qualifications to be a Commission licensee.

(6) To determine whether United Broadcasting Company has failed to comply with the provisions of Section 1.526 of the Commission's Rules, and, if so, to determine the effect thereof on its comparative qualifications to be a Commission licensee.

(7) To determine on a comparative basis whether there are significant differences between the applicants with respect to the scheduling of public affairs programs; and, if so, whether such differences demonstrate superior devotion to community service.

The Review Board placed the burden of proceeding with the introduction of evidence with respect to issue (2) on PCI. The burden of proceeding with the introduction of evidence with respect to issues (1), (3), (4) and (5) and the burden of proof with respect to issues (1), (2), (3), (4) and (5) were placed upon United.

4. The Review Board further ordered that a grant of the application for renewal of United's license to operate Station KBAY

would be without any prejudice to whatever action, if any, the Commission deemed appropriate upon conclusion of the proceedings in *Johnson* v. *KLOK, KEEN, KLIV, KSJO,* and *KXRX* (C-73–2138 SC) now pending in the U.S. District Court for the Northern District of California. The Board instructed United to immediately notify the Commission of the final disposition of the case.

5. By *Order* released November 12, 1976, FCC 76M-1486, the presiding judge ordered that United Broadcasting be permitted to adduce evidence under the standard comparative issue to demonstrate the benefits accruing from United's horizontal and vertical antenna polarization and Stereo-FM service.

6. Prehearing conferences were held on December 10, 1975 (this one only before former Presiding Judge Ernest Nash), August 12, 1976, and March 2, 1977 at the offices of the Commission in Washington, D.C. An admissions hearing was held at the Commission's offices in Washington on May 16, 17, 18, 23 and June 30, 1977. Hearings were held in the United States Court of Appeals building in San Francisco, California on July 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, 1977. The record was closed by *Memorandum Opinion and Order* released January 13, 1978 (FCC 78M-50).

7. Proposed Findings of Fact and Conclusions of Law were submitted by Bureau and United on May 4, 1978 and by PCI on May 5 and 8, 1978. Replies were filed by Bureau on June 22, 1978, by United on June 23, 1978 and by PCI on June 26, 1978.

Findings of Fact

The Applicants

8. At the time of the hearing, George D. Snell was the secretary-treasurer, a director and a 32.26% stockholder of United. He had held these positions since March 4, 1963 when KBAY went on the air after Commission grant of its construction permit application. Floyd Farr was the vice-president, a director and a 32.26% stockholder of the corporation.[1] George Mardikian was the president, a director and a 32.25% stockholder of United.[2] (Gregory Mardikian - George Mardikian's nephew - owned the remainder of United stock.) The principals each also owned a one-third interest in Stations KCVR and KWIN(FM), Lodi, California. Since the hearing, Mardikian has passed away and as a result, Snell has been elected president of the corporation.[3] Ray C. Hollingsworth is station KBAY's General Manager. He has held this position since 1963.

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[1] Farr did not testify at the hearing. He is incapacitated both mentally and physically as a result of several heart attacks and strokes.

[2] Mardikian did not testify at the hearing. According to an affidavit by Dr. Walter W. Port, Mardikian's appearance would have endangered his life.

[3] In a petition for leave to amend, filed November 8, 1977, United reported that at a corporate meeting held on October 28, 1977, Snell was elected to replace

9. Public Communicators, Inc. is a non-profit corporation operated by a thirteen member board of directors. The PCI directors are Ramiro Asencio, Lawrence Bensky, Al Calame, Ricardo Cantu, George Conklin, Myrna Fabbri, Mary Joe Foote, Phillip Jacklin, Leonard Krimerman, David McNeil, Florene Poyadue, Turhan M. Poyadue and Patsy Williams. The officers of the corporation are as follows: McNeil, President; Poyadue, Vice-President; Cantu, Secretary; and Krimerman, Treasurer.

United Broadcasting Company, Inc. (KBAY)

Issue (1): Public Affairs Programming

10. The Review Board's addition of an issue to determine whether United adequately served the community's needs with the public affairs programming presented in the 1971–1974 license term was based upon an analysis of the licensee's composite week logs. According to the Review Board, an analysis of the licensee's 1971–1974 program logs for the composite week and United's list of typical and illustrative programs broadcast during the license term revealed that United broadcast only 101 minutes of public affairs programs and that it put these programs on at times of low audience potential. In addition, the only full length programs, "Washington Window" and "UN Week in Review," did not appear to address any local problems. They were broadcast between 6:30 and 7:30 a.m., Sunday. The remaining fifty-six minutes of public affairs programs, consisting of locally produced editorials were carried during "graveyard" hours (between 1:01 a.m. and 5:30 a.m.). The Review Board stated, however, that this is not to say that these programs might not have satisfied some local needs, but rather that a question is raised whether such programming is responsive to local needs. 59 FCC 2d at 1414.

11. United conceded that the only full-length programs broadcast in the composite week were "Washington Window" and "UN Week in Review," aired on Sunday during the time period 6:15 to 7:30 a.m. Editorials of two-minute duration were broadcast at 1:00, 2:00, 4:00 and 5:00 a.m. on each day of the composite week. In addition, the program "Assemblyman Richard Hayden" was broadcast at 3:42 a.m. on May 27, 1973 and at 3:44 a.m. on May 31, 1973 of the composite week. Each broadcast was 3 minutes in length. Moreover, United claimed that 10 minutes of the program, "San Jose Rescue Mission," which was broadcast once during the composite week on a Sunday from 7:30 to 8:00 a.m., constituted public affairs programming in the composite week (United Ex. 3, p. 5). Finally,

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Mardikian as president of the corporation. Mr. Haid Mardikian was elected corporate vice-president and secretary-treasurer. Under Mardikian's will his wife, Nazenig Mardikian, and his children, Haig and AnitaNaz Mardikian are equal legatees.

United contends that the composite week did not accurately reflect the extent of KBAY's public affairs programming responsive to the community needs and problems ascertained. (United Ex. 1, pp. 1–205).[4]

12. United's 1971 ascertainment survey identified the following as the ten most significant needs in the San Jose community: (1) crime, law and order, police protection; (2) improved educational facilities; (3) lack of mass transportation; (4) air and water pollution and waste disposal; (5) moral laxity; (6) unemployment, recession, job losses; (7) drug abuse; (8) welfare; (9) minority problems including housing; and (10) population congestion (United Ex. 1, p. 1).

13. The programming broadcast by United in response to the significant needs identified were the following: (1) "Community Focus;" (2) "You and Your Community;" (3) "San Jose Rescue Mission;" (4) "State Capitol Report;" (5) "Washington Window;" (6) "UN Week in Review;" (7) "San Jose Yesterday and Today;" (8) "Perspective;" (9) "Overseas Assignment;" (10) "Editorials;" (11) "Free Speech Messages;" (12) "Public Service Announcements;" and (13) "Guestitorials" (Guest Editorials) (United Ex. 1, p. 1).

14. "Washington Window" is a thirty-minute program of interviews and commentary by nationally known persons in government and public affairs concerning national issues. During the time period December 12, 1971 to January 2, 1972 the program was broadcast from 6:00 to 6:30 a.m. on Sundays. From January 3, 1972 to July 29, 1974 the program was broadcast from 6:30 to 7:00 a.m. on Sundays. Thereafter, in addition to the Sunday broadcasts, "Washington Window" was broadcast from 3:30 to 4:00 a.m. on Mondays (United Ex. 1, p. 180).

15. The specific dates of broadcast are as follows (United Ex. 1, pp. 18–19):

December 12, 19, 1971; January 2, 9, 16, 23, 30; Feb. 6, 13, 20, 27; March 5, 12, 19, 26; April 2, 9, 16, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 17, 24, 31, 1972. January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 28; August 5, 12, 19, 26;

[4] United program logs dated December 6, 1971, May 9, 1972, October 18, 1972, March 22, 1973, August 6, 1973, January 12, 1974 and June 16, 1974, and the one week of KBAY tapes monitored by PCI in 1974 indicate that no free speech messages, public affairs programs (other than editorials and "Washington Window") guest editorials or replies to station editorials were broadcast on those dates. In addition, the logs reflect that 25 two-minute editorials were broadcast during the hours 1:00 a.m. to 5:05 a.m. A total of 45 two-minute editorials were broadcast by United during the week in 1974 monitored by PCI. 30 editorials were scheduled during the hours 1:00 a.m. and 5:05 a.m. and 15 were broadcast between 12:00 noon and 7:05 p.m. (Joint Ex. 1; PCI Exs. 35 and 36).

September 2, 9, 16, 23, 30; October 7, 14, 21, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973. January 6, 13, 20, 27;[5] March 3, 10, 17, 24, 31; April 7, 14, 21, 28; May 5, 12, 19, 26; June 2, 9, 16, 23, 30; July 7, 14, 21, 28; August 2, 4, 5, 11, 12, 18, 19, 25, 26; Sept. 1, 2, 8, 9, 15, 16, 22, 23, 29, 30; October 6, 7, 13, 14, 20, 21, 27, 28; Nov. 3, 4, 10, 11, 17, 18, 24, 25, 1974.

DECEMBER, 1971

Exemples

Agriculture Secretary Earl Butz says he is against the 25 percent increase in price supports for grain before Congress. He says the legislation, if passed, would "sabotage the Farm Act of 1972."

JANUARY, 1972

2 — John W. Gardner, Chairman of Common Cause, says most state legislatures are "riddled with conflict of interest, riddled with corruption, and wholly inadequate instruments of self-government."

9 — C. Jackson Grayson, Chairman of the Price Commission, says the President's economic stabilization program will be in operation until April 30, 1973, but adds that some "aspects of the program will begin to decontrol" by spring this year.

AUGUST, 1973

5 — Barbara Mikulski, Chairperson of the Democratic Delegate Selection Commission, says the job of the Commission is to review and improve the rules of the convention. She explains the "quota system" of the delegate selection and proportional levels that must be present at the convention according to the district's choice.

12 — George Bush, Chairman of the GOP National Committee comments on the Watergate situation and its affect on the Republican Party. He says ". . . . . well, my thesis is that it hurts politics more than it does the party."

JANUARY, 1974

6 — William E. Simon, Director, Federal Energy Office, discusses the energy situation, gas rationing and the Alaskan pipeline.

27 — Robert Carlson, U.S. Welfare Commissioner, discusses the problems of the Welfare Department and the difficulties of administrating welfare to needy families (United Ex. 1, pp. 24–48).

[5] The February 1974 logs had been misplaced by the licensee and could not be located for analysis (United Ex. 1, p. 19).

16. "UN Week in Review", a fifteen minute program addressing the community need of government, reports actions taken by the United Nations. The program was broadcast on KBAY during the period December 12, 1971 to January 2, 1972, Sundays, from 6:30 to 6:45 a.m. From January 2, 1972 to Nov. 19, 1974 the program was broadcast, Sundays, from 6:15 to 6:30 a.m. Thereafter, beginning August 1, 1974 the program was also broadcast, Fridays from 3:30 to 3:45 a.m. (United Ex. 1, pp. 55).

17. The specific dates of broadcast are as follows:[6]

December 12, 19, 1971; February 6, 13, 20, 27; March 5, 19, 26; April 2, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 27; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 24, 31, 1972; January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 29; August 5, 12, 19, 26; September 2, 16, 23, 30; October 7, 14, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973; January 6, 13, 20, 27; May 26; August 4, 9, 11, 16, 18, 23, 25; September 1, 6, 8, 13, 15, 20, 22, 27, 29; October 4, 6, 13, 18, 20, 25, 27; November 1, 3, 8, 10, 15, 24, 1974. (United Ex. 1, p. 55).

18. "Perspective," a fifteen-minute program by UPI reporters and correspondents, addressed the ascertained needs relating to government. According to United, the program discussed national and international news of the week. It was broadcast Tuesdays from 3:30 to 3:45 a.m. on the following dates (United Ex. 1, p. 65):

July 30, August 6, 13, 20, 27, September 10, 16, 24, October 1, 8, 22, November 12, 1974 (United Ex. 1, p. 65).

19. "Overseas Assignment" is a thirty-minute program prepared by the BBC and distributed by Broadcasting Foundation of America, featuring discussions of world events and problems by foreign correspondents. The program addresses ascertained needs relating to government, crime and minorities. It was broadcast, Wednesdays, from 3:30 to 4:00 a.m. on the following dates:

July 31, August 7, 14, 21; September 11, 18, 25; October 2, 9, 16, 23, 30; November 6, 13, 20, 27, 1974 (United Ex. 1, p. 66).

20. The following is an example of the substance of a typical "Overseas Assignment" broadcast (United Ex. 1, p. 67).

DATE: 8–5–74 TIME: 28'15"

Washington— *The New York Times* judiciary reporter describes the mechanics of the impeachment process against Richard Milhous Nixon.

Cyprus— The future of Cyprus—a return to constitutional order.

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[6] No program tapes were available when the United Nations was not in session. In addition, the February station logs were not available for analysis (United Ex. 1, p. 55).

Athens— What is the military element in Greek politics after civilian government has been restored?

London— The "social impact" between Britain's labor government and the trade unions.

Madrid— The Spanish Sahara causes conflict between Spain & Morocco.

Laos— The present situation of the Laotian government of Nation Unity, in which pro-and anti-communist parties share power.

Belfast— Internal disputes of Protestant groups in Northern Ireland preceed upcoming constitutional convention election.

Portugal— Recent Portuguese coup has hampered moves toward educational reform.

21. "Washington Window," "UN Week in Review," "Prospective" and "Overseas Assignment" are all programs taped from the UPI Audio line (Tr. 1704). Snell admitted that the programs do not address any uniquely local needs or problems. However, he stated that national problems discussed often have local impact (Tr. 1706–10).

22. "Community Focus" is a fifteen-minute interview program conducted by Lawrence Jones, a black San Jose attorney. The program addresses the community problems of crime, government, minorities, drug abuse, moral laxity, city planning, housing, inflation and recreation. The program was broadcast from 3:30 to 3:45 a.m., Saturdays, and repeated at 11:30 to 11:45 p.m., Sundays, during the period August 1974 through December 1, 1974 (United Ex. 1, pp. 2–4). A summary of the guests presented on "Community Focus" and the topics of discussion are incorporated in the chart below (United Ex. 1, pp. 3–4):

BROADCAST DATES (All 1974)	GUESTS	TOPICS
Aug. 4, 10, 11, 17, 18, 24, 25, 29	SHELDON PORTMAN, Public Defender, Santa Clara	Duties of Public Defenders
	HEWITT JOYNER, Executive Director of Black Council on Alcoholism	Problems of blacks with alcohol
	REV. GEORGE W. SMITH Emmanuel Baptist Church	Church in the community
	ROBERT W. CLARK, Acting, District Administrator, Parole and Community Services, Adult Parole Board	Problems of parolees

BROADCAST DATES (All 1974)	GUESTS	TOPICS
September 1, 8, 14, 15, 21, 22, 28, 29	HAROLD ROSEN, Deputy City Manager	Problems in the hiring of minority applicants
	GEORGE SHIGO, Field Representative, Social Security Administration	Social security benefits
	ROY BEASLEY, Supervisor of Investigations, Child Support Unit, Dept. of Social Services	Support to children without fathers
	BETH BOTTOMLEY, Chrysalis, Inc. Executor Director	Drug abuse and its prevention
Oct. 5, 6, 12, 13, 19, 20, 26, 27	JANET HAYES, BART COLLINS, Candidates for Mayor of San Jose	Campaign rhetoric
	HON. NORMAN MINETA, Candidate for 13th Congressional Race HON. GEORGE MILLAS, Candidate for 13th Congressional Race	Campaigning speeches; campaign questions
Nov. 2, 3, 9, 10, 16, 17, 23, 24, 30	THOMAS MOORE, Professor, Stanford University	(Two Programs) Recession; inflation
	DICK GADE, United Fund	Services of United Fund

23. Jones is the Deputy District Attorney for Fresno County (Tr. 905). He stated that it was his responsibility to select the speakers for "Community Focus" and to determine the topics for discussion. Jones is not an employee of the station. He was not paid for his work there (Tr. 908–09). Jones selected the topics for discussion based on his experiences as a member of a minority group and as an attorney (Tr. 910). According to Jones, he and Snell engaged in discussions regarding the ascertained community needs and problems and the direction of the program in addressing those needs. Jones believes that the program did address the community's needs and problems (Tr. 911). For example, Reverend Smith discussed senior citizen housing projects. Mr. Clark explained the problems of parolees and those graduating from the criminal justice system (Tr. 913). Mr. Rosen discussed problems relating to the police force and minorities (Tr. 914–15). Mr. Shigo spoke about social security benefits, particularly with respect to the aged and disabled (Tr. 915–16). Mr. Beasley discussed the problems associated with absentee fathers and the

qualifications necessary for welfare assistance (Tr. 916). Professor Moore discussed inflation, *i.e.*, why prices are going up every week (Tr. 917).

24. "You and Your Community," which addressed the community needs of education, social services, and welfare, was broadcast during the period August 3, 1974 through December 1, 1974, Saturdays, from 3:45 p.m. to 3:45 a.m. and repeated at 11:45 p.m. to 12 midnight, Sunday (United Ex. 1, pp. 6–8).

25. A summary of the guests presented on "You and Your Community" and affiliated organizations are incorporated in the chart below (United Ex. 1, pp. 7–8).

Broadcast Dates (All 1974)	Guest and Affilicted Organization
Aug. 3, 4, 10, 11, 17, 18, 24, 25, 31	George Costa, San Jose Music Theatre, Resident Director
	Florence Peer, Variety Audio, Vice President; West Valley Federated Women's Club of San Jose, Chairperson
	Danny Hill, Santa Clara County Fair, Supervisor of Publicity; Darien, Russell & Hill, Public Relations and Advertising
	Harvey Fine, Sea Cadets, Commanding Officer, Squadron VP46, Moffett Field
Sept. 1, 7, 8, 14, 15, 21, 22, 28, 29	John Healy, San Jose Childrens' Theatre, Director
	Mrs. John H. Pfeiffer, Catala Club Fashion Show, University of Santa Clara, Club President
	Ann Tunzi, Saratoga Parade Committee, Parade Sponsors Association of Northern California
	Father Terry, University of Santa Clara, President
	Jeff Dooley, Mental Health Association, Public Information Director, Santa Clara County
Oct. 5, 6, 12, 13, 19, 20, 26, 27	George Barati, Santa Cruz Symphony Conductor; Villa Montalvo, Director; Saratoga

Broadcast Dates (All 1974)	Guest and Affilicted Organization
	Don Thomson, Symphony, General Manager
	Harvey Fine, Sea Cadets, Commanding Officer, Squadron VP46, Moffett Field
	Rudy Gatti, Santa Clara Unified School District Superintendent
Nov. 2, 3, 9, 10, 16, 17, 23, 24, 30	Mary Whitfield, Adult Education, Cupertino, Certified Graphologist
	Jerry Beavers, YMCA, San Jose, Health and Physical Education Director
	Marilyn L. Drake, Women's Missionary Council of Bethel Church, President
	Claire Marino, Villa Montalvo Yuletide President of Montalvo Service Group
	Jeanne Spencer, Valle Monte Christmas Tree Elegance, Public Relations, Member 20 years.

26. Pasqualina di Lonardo Rossetti selected the interviewees and hosted "You and Your Community" (Tr. 1125). Rossetti was not an employee of or under contract with Station KBAY. She volunteered her services to the station because she had been doing community work and wanted to participate in an interview program (Tr. 1128). Although Rossetti was not familiar with the specific community needs and problems ascertained by United in 1971, she stated that had she prepared her own list of problems to be addressed by "You and Your Community" it would have been similar to that compiled by United (Tr. 1130). Rossetti testified in detail as to the subjects of her interviews. For example, she stated that George Costa discussed community events relating to drama and music. Florence Peer addressed the program sponsored by "Variety Audio" involving community volunteers who tape books for the blind (Tr. 1131). During the interview with Father Terry, communications problems relating to the university were discussed (Tr. 1133). For the most part, Rossetti described her programs as informative and educational (Tr. 1138). Some of the programs related to a special community event, as the Saratoga Parade Committee and the San Jose Children's theater (Tr. 1139).

27. "San Jose Rescue Mission" is a half-hour program broadcast Sundays from 7:30 to 8:00 a.m. (United Ex. 1, p. 10). According to

Lester Myers, the Superintendent and Executive Director of the San Jose Rescue Mission, United is paid a hundred dollars by the Rescue Mission for the broadcast time (Tr. 1250). The Rescue Mission is a Gospel preaching mission founded for the purpose of presenting the Gospel and feeding the hungry, housing the poor and clothing the naked (Tr. 1226–7). Myers conducts the program, which generally begins with a recitation of two scriptures. Then a particular problem, *e.g.*, drunkenness or crime, is discussed relating perhaps to a family. The particular problem is related to the scripture passage. The scripture thesis and religious matters are addressed throughout the entirety of the program (Tr. 1228–1233). Myers stated that he relates the scripture throughout ". . . because the Scripture has the answer to the problems of you or myself or anybody else" (Tr. 1236). Music of a religious inspirational nature is played on the program (Tr. 1239). The program usually ends with the conclusion that God has the answer to all needs and that he is the solution (Tr. 1247–48).

28. "San Jose Rescue Mission" was broadcast on the following dates during the 1971–74 license period (United Ex. 1, p. 10):

December 5, 12, 19, 26, 1971; January 2, 9, 16, 23, 30; February 6, 13, 20, 27; March 5, 12, 19, 26; April 2, 9, 16, 23; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 17, 24, 31, 1972; January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 29; August 5, 12, 19, 26; September 2, 9, 16, 23, 30; October 7, 14, 21, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973; January 6, 13, 20, 27;[7] March 3, 10, 17, 24, 31; April 7, 14, 21, 28; May 5, 12, 19, 26; June 2, 9, 16, 23, 30; July 7, 14, 21, 28; August 4, 11, 18, 25; September 1, 8, 15, 22, 29; October 6, 13, 20, 27; November 3, 10, 17, 24, 1974;

29. "State Capital Report," is a five-minute program prepared and narrated by Richard Hayden, Assemblyman from the 22nd District, State of California, concerning the weeks events in Sacramento. The community needs addressed by the program relate to government. The program was broadcast from 11:30 to 11:35 p.m., Sunday. The program was broadcast on the following dates during the time period December 1971 to December 1972 (United Ex. 1, p. 11).

December 5, 12, 19, 26, 1971;[8] January 16, 23, 30; February 6, 27; March 5, 12, 19, 26; April 2, 9, 16, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3,

[7] The February logs were misplaced and not available for analysis (United Ex. 1, p. 10).

[8] No program was broadcast on January 2, 9, February 13 and 20, 1972 (United Ex. 1, p. 11).

10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 1972.

30. Thereafter, a hiatus in the broadcast of "State Capital Report" occurred until February 20, 1973 when it was aired within the program "Community Spectrum," which was broadcast from 3:30 to 4:00 a.m. The program name was then changed to "Assemblyman Richard Hayden" and it was logged as a public service announcement (United Ex. 1, p. 11).[9] The dates of broadcast in 1973 and 1974 are as follows (United Ex. 1, pp. 11–13):

February 20–23, 26–28, March 1–2, 5–9, 19–23, 26–30, April 2–6, 9–13, 16–19, 23–27, 30, May 1–4, 7–11, 14–18, 21–25, 28–31, June 1, 4, 21, 22, 25; August 7–10, 13, 23, 24, 27–31; September 10–14, 7–21, 24–28, October 1–5, 11, 12, 15–19, 22, 23, 1973; August 18, 1974.

31. The following represents a sample of the specific topics addressed by "State Capital Report." The dates noted do not reflect the date of broadcast but the date of the script. It was not possible to correlate the script dates with the actual broadcast dates (United Ex. 1, p. 14):

December 10, 1971	Report on activity of the Legislature in 1971.
December 23, 1971	The 18-year-old voter.
February 18, 1972	Mass Transportation.
February 25, 1972	Property tax relief for senior citizens.
March 10, 1972	Importance of educational institutions and their support.
March 24, 1972	Pollution of the environment; the antipollution initiative on June ballot.
March 31, 1972	The Catastrophic Health Insurance plan proposed by the Governor.
April 7, 1972	The Coastline Preservation Bill is discussed.
April 28, 1972	Consumer protection measures are commented on; consumers can provide their own best protection by becoming informed.
July 7, 1972	Discussion of the Equal Rights Amendment.
July 14, 1972	Views on the reapportionment of State Senators and Assemblymen.
April 13, 1973	Drug abuse.

32. "San Jose Yesterday and Today" is a fifteen-minute program of interviews and commentary conducted by Ray Blackmore. The program addresses the ascertained needs of crime and government. "San Jose Yesterday and Today" was broadcast from 7:15 to 7:30 a.m., Sundays, in 1971 and from 7:00 to 7:15 a.m., Sundays, in 1972

[9] United claims that the program was erroneously logged as a public service announcement and that it is a public affairs program (United Ex. 1, p. 11).

through 1974 with a repeat of the program at 3:30 to 3:45 a.m., Fridays, beginning August 24, 1974 (United Ex. 1, p. 56).

33. The specific dates of broadcast follow (United Ex. 1, pp. 56–57):

December 5, 12, 19, 26, 1971; January 2, 9, 16, 23; February 6, 13, 20; March 5, 12, 19, 26; April 2, 9, 16, 23; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3, 10, 24; October 8, 15, 22; November 12, 19; December 3, 10, 17, 24, 31, 1972; January 14, 21, 28; February 4, 18, 25; March 4, 18; April 1, 22; June 10, 17, 24; July 8, 29; August 12, 26; September 16, 30; October 14, 21, 28; November 11, 18, 25; December 2, 9, 23, 30, 1973; January 20;[10] March 3, 17, 24; April 7, 14, 21, 28; May 19, 26; August 4, 6, 9, 11, 13, 16, 18, 20, 23, 25, 27; September 1, 2, 6, 8, 10, 13, 15, 16, 20, 22, 24, 27; October 1, 4, 6, 8, 11, 13, 15, 18, 20, 22, 25, 27; November 1, 3, 5, 8, 10, 12, 15, 17, 19, 22, 24, 29, 1974.

34. Ray Blackmore was the Police Chief of San Jose for over 24 years. On some of the programs guest speakers were presented. However, for the most part, Blackmore personally addressed various community problems based upon his experiences in the community.[11] (Tr. 1185). Blackmore's participation on Ramsey Clark's committee on riots served as one of the topics of discussion (Tr. 1182–1186). Other programs addressed problems Blackmore encountered as a part-time professor at San Jose State University (Tr. 1187). His participation in the San Jose Police Athletic League drive to raise $500,000 to obtain lighting for the playing fields (Tr. 1188), in locating housing for the Mexican Chamber of Commerce (Tr. 1188), and in the central YMCA (Tr. 1188) provided basis for several programs. Blackmore also discussed the charitable organization City of Hope on "San Jose Yesterday and Today" (Tr. 1189). Blackmore is a trustee on the Music and Artists Foundation of Santa Clara. Blackmore served on the Board of Directors of a Mexican-American association. The problems of the Mexican-American community were discussed (Tr. 1196–7). He also advocated a new sports arena on several programs. This arena was a controversial issue in Santa Clara County because of the 22 million dollar cost involved (Tr.

[10] United's February 1974 logs were misplaced and not available for analysis (United Ex. 1, p. 56).

[11] Blackmore is the past president of the California Peace Officers Association, International Association of Professional Footprinters, California Chapter, Bay Counties Peace Officers Association, and Bay Area Traffic Executive Council. He is a graduate of the FBI National Academy, Washington, D.C., and a Life Member of the International Association of Chiefs of Police. Blackmore is also a member of the International Association of Chiefs of Police Public Relations & Research Committees, Attorney General Ramsey Clark's Committee on Riots, Governor Edmund Brown's Committee on Children and Youth, and Attorney General Stanley Mosk's Committee on Crime Statistics. He is also involved in many other community activities and was elected one of the six most respected individuals in Santa Clara County (United Ex. 1, p. 58–64).

1208–9). Pre-trial publicity and civil demonstrations were also discussed by Blackmore. During the hearing, he related a speech he had prepared on civil demonstrations and the First Amendment. The speech he had prepared was recited during one of the programs (Tr. 1208–9). Blackmore broadcast programs as diversified as one discussing public landmarks and another advising people entering retirement (Tr. 1215–16).

35. United also broadcast editorials during the 1971–74 license term that addressed ascertained community needs. Beginning December 1971, editorials were aired daily at 1:30 and 5:30 a.m. (or within an hour of these times). Starting March 10, 1972, editorials were presented at 1:01, 2:01, 4:01 and 5:01 a.m. Editorials ran daily at 1:01, 2:01, 3:01, 4:01 and 5:01 a.m. beginning May 5, 1974. Finally, as of June 10, 1974, editorials were broadcast daily at 1:01, 2:01, 3:01, 4:01, 5:01 a.m.; and 1:00, 2:00 and 7:00 p.m.

36. The editorials were written by Snell and on occasion by Hollingsworth (United Ex. 1, p. 117–18). Hollingsworth recorded the editorials (United Ex. 1, p. 118). According to Snell, they were broadcast in rotating sequence, and as a matter of normal station procedure, at a week's end the editorials recorded were erased (United Ex. 1, p. 119). Jeanne Langstaff, KBAY's traffic manager and bookkeeper, testified that during the period fall 1972 to December 1974, she was responsible for insuring that editorials were properly logged and that an editorial tape was in the control room to be broadcast at the time it was scheduled on the station logs. Langstaff stated that she performed her duties. (United Ex. 1, p. 120; Tr. 1081–82). John Vincent McKay, a station KBAY employee during the period April 30, 1972 until May 1, 1975, disputed the testimony of Langstaff and Snell. He stated that "new editorials were only read when Snell got around to it," and that sometimes they would not be changed for several months (Tr. 1982, 2024). McKay's employment at the station had been terminated by Hollingsworth (Tr. 1973).

37. The following list sets forth a sample of the editorials broadcast during the license term categorized under the ascertained need that it addressed (United Ex. 1, pp. 79–116). The dates noted next to each editorial reflect the date the editorial was written or recorded (United Ex. 1, p. 76).[12]

CRIME/LOCAL (Law and Order, Police Protection, Etc.)[13]

2–12–72	Six steps to take in preventing home thefts
2–5–73	Locked cars reduce crime's incidence
3–5–73	Support is given to a Federal Bill backed by San Jose

[12] The editorials were categorized according to community need and problem addressed by Robert L. Athnos, a copy writer at Station KBAY (United Ex. 1, p. 76, Tr. 1338).

[13] All editorials were two minutes in duration (United Ex. 1, p. 77).

Police Chief Murphy which would secure funds for police protection through revenue-sharing on a direct city basis

9–3–74 State Student Training on Prevention (STOP) Program praised

IMPROVED EDUCATIONAL FACILITIES/LOCAL (Curriculum, School Concepts, Educational Problems, etc.)

1–15–72 The free public library system should be a source of pride

3–7–72 The 'year-round' school system has merit

4–1–72 Reading skills are of primary importance

7–30–74 A listener's response to an editorial which states "the poor quality of education can be objected to, by voting down schools bonds."

10–14–74 Steps must be taken to alleviate violence in the schools

TRANSPORTATION/LOCAL (Traffic Congestion, No-Fault Insurance, Mass Transit, Traffic Safety, Etc.)

1–6–72 Improvements at the San Jose Municipal Airport that would increase traffic and add new airlines, favored.

2–14–72 Traffic congestion/car pools advocated

2–5–73 Eliminate unnecessary road-way obstructions

2–17–73 Hitchhiking dangers must be re-emphasized to youth

* * 74 Voter approval is needed for a sales tax or property tax to provide funds—to be matched by the Federal Government—to proceed with eventual establishment of a Santa Clara County mass transit system (#84).[14]

POLLUTION/LOCAL (Air, Water, and Waste)

12–9–71 Environmental 'clean-up' undoubtedly means greater local taxation

12–23–71 Needed is a better system of collecting recyclable items

6–6–72 Priority must be given to utilization of variant modes of transportation

2–17–73 Keeping the Stanislaus River as a wilderness area river is advocated

MORAL LAXITY/LOCAL

2–28–72 Term papers—pre-written by professionals and purchased for 'turn-in' by students—is a definite lapse of moral values

4–12–73 A recommendation that the courts "throw out" a suit

[14] This editorial was not dated. Pursuant to an editorial numbering system instituted in 1974, the editorial is presumed to have been written, recorded and aired in 1974 (United Ex. 1, p. 77).

for damages filed against the San Jose Police Department for removing material from a pornographic book store

ECONOMY/LOCAL (Unemployment, Recession, Inflation, Taxes, etc.)

5–12–73 Social Security is *not* a 'nest egg to security'.

8–18–73 Unemployment/need for technical training

12–27–74 Reply to listener response/Congressional responsibility to curb inflation

DRUG ABUSE/LOCAL (Addiction, Intoxication, Programs, etc.)

1–6–72 A two-step plan—submitted by Santa Clara County executive, Campen—which would endeavor to rehabilitate those arrested for drunkenness, is supported

* * 74 An answer to an editorial elicits a 'salute' to Mr. Joe Mann of Redwood City, and the alcoholic Rehabilitation unit at Crystal Springs Hospital in Redwood City.[15]

WELFARE/LOCAL

12–9–71 Welfare cheating may be more 'fiction' than 'fact'.

3–5–73 Strong measures by the Santa Clara County Board of Supervisors are urged, in light of a county welfare report showing waste and inefficiency

MINORITY PROBLEMS/LOCAL (Discrimination, Housing, Etc.)

3–5–73 A neighborhood development program grant received by San Jose from the Federal Department of Housing and Urban Development (HUD) is explained and commended

* * 74 Rules for 'fairness in lending' to females should be defined[16]

POPULATION/LOCAL (Congestion, Specific Age Groups, Demographics, etc.)

1–9–72 A research corporation survey shows that resident want a 'slow down' in Santa Clara County's rapid urbanization. Urged, is a 'middle of the road' course

GOVERNMENT/LOCAL (Politics, Federal Spending, etc.)

3–5–73 A Santa Clara County survey shows that county residents are opposed to subsidized political campaigns. This station agrees with the survey results

ENERGY/LOCAL (Oil, Electricity, Nuclear Power, Conservation, Etc.)

8–18–73 The Alaskan pipeline, and nuclear power plants are vital to alleviate our future energy shortages

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[15] Pursuant to United's numbering system, this editorial is presumed to have been broadcast in 1974 (United Ex. 1, p. 77).

[16] Pursuant to United's numbering system, this editorial is presumed to have been broadcast in 1974 (United Ex. 1, p. 77).

10–14–74 Alternate sources of energy—such as the investigation of solar energy—are the beneficial by-products of the energy crisis

38. United broadcast "free speech messages" during the period August through October 1974. Free speech messages are recorded by a person from the organization sponsoring the message (Tr. 868). The message may be a comment by a member of the community on an issue of local importance (Tr. 866). Broadcasts were scheduled at the following times:

Monday through Friday: 9:20, 11:20 a.m.; 9:20 p.m.
Saturday: 8:16 a.m.; 4:20, 7:20 p.m.
Sunday: 3:20, 5:20, 8:20 p.m.

39. The following is a sample of the organizations broadcasting messages on KBAY and the ascertained need addressed:

August	1	League of Women Voters: Government
	2	Black Council on Alcoholism: Drugs
	5	Social Action Research Center: Minorities; Health
	6	Space Program: Environment
	9	Educational Opportunity Program: Education & Minorities
	18	Teamsters Cannery Local @@679: Health
	20	Headstart: Minorities; Education
	21	Peace Corps: Social Service
	24	Chicano Employment: Minorities, Employment
	25	East Valley Alcohol Clinic: Drugs
	29	Committee for Open Media: Media
Sept.	2	Friends of the Earth: Energy
	3	S.J. Youth Commission: Education
Oct.	1	League of Women Voters: Government & Education
	2	Committee for Women's Center: Minorities
	4	Alviso Community Center: Drugs
	6	Frontlash: Education

40. Some of the free speech messages were initiated by members of the community. Others were specifically solicited by station KBAY (Tr. 866). John David Webster, public affairs director, since April 1974, was responsible for acquiring free speech messages (Tr. 870–71). Webster stated that it was difficult to obtain the announcements. According to Webster, although people had ideas that they wanted broadcast, they would want somebody else to record the message (Tr. 882).

41. Eight "guest editorials" (editorials written or voiced by guest listeners) addressing ascertained community needs were broadcast by KBAY during the 1971–1974 license term. Guest editorials were broadcast in regular editorial time slots (Tr. 881). An editorial dated July 30, 1974 addressed the topic "improved educational facilities." Three editorials broadcast in 1974 addressed problems relating to the economy. The subject of drug abuse was discussed in three editorials, broadcast in 1972, 1973 and 1974. Problems related to

population were discussed in an editorial dated May 9, 1972 (United Ex. 1, p. 183).

42. During the period 1971 through 1974, KBAY did not maintain a local news staff. There was no local news director. However, Snell stated that twenty-five percent of United's news addressed local matters (Tr. 1722–1725). The source for KBAY news was the United Press International wire service (United Ex. 19, p. 2). In January 1971, five minutes of news was broadcast at 6:00, 7:00 and 8:00 a.m. with 6:30, 7:30 and 8:30 a.m. sportscasts. On September 1, 1972, an additional news broadcast was added at 5:55 p.m. In January 1974, 5 minute newscasts were added to the schedule at 12 noon, 3:00, 5:00 and 5:55 p.m. According to Snell, the amount of news time was increased in order to provide news principally between the hours of 6:00 to 8:30 a.m. and 4:30 to 6:00 p.m. to coincide with the traditional news-listening, peak traffic hours (United Ex. 19, p. 2).[17]

43. An analysis of KBAY newscasts during the period June 26 to July 2, 1974 indicates that two stories originated in Santa Clara County. One story related to a local drowning, and the other to local earthquake predictions. Twenty-two stories originating from the Sacramento State Legislature addressed matters affecting Santa Clara County, such as the state budget and local pay raises. Twenty-seven stories of a regional nature were broadcast which affected Santa Clara County, as the state carpenters strike and transportation problems. Twenty-eight stories were of regional origin, not directly affecting Santa Clara County. Examples include a human interest story on the San Francisco Zoo and a story on Patty Hearst (Joint Ex. 3, pp. 1–7).

44. Snell testified that he believes certain public service announcements also constitute public affairs programming.[18] United broadcast approximately 135 public service announcements in the composite week ranging in length from 10 to 60 seconds (United Ex. 5, p. 5–12). Snell testified that the public service announcements are informational usually having to do with something of interest or value to the public (Tr. 1715–16). He stated that when the 1071 renewal application was filed he did not consider public service announcements as public affairs programming. He stated that he counted the number of public service announcements and entered that number in the public service announcement category on the renewal application (Tr. 1718). However, after designation of the

[17] As of August 1974, KBAY broadcast 5 minute newscasts at: 12 midnight, 1:00, 2:00, 4:00, 5:00, 6:30, 7:30, 8:30, 9:00 a.m. 8 minute newscasts were broadcast at: 6:00, 7:00 and 8:00 a.m. 5 minute broadcasts were also scheduled at: 12:00 noon, 2:55, 5:00 and 9:00 p.m. (United Ex. 19, p. 7).

[18] An example is the "can-do recycling center" public service announcement, urging the public to bring its aluminum cans for recycling (Joint Ex. 2, pp. 1–2). United set forth a number of public service announcement scripts and identified the ascertained community need that each addressed (United Ex. 5, pp. 5–97).

instant proceeding, Snell began to think about the cross-over between public service announcements and public affairs programming (Tr. 1721–22).

45. According to Snell, the public affairs programs for the most part were scheduled for the early morning hours because "we felt that those are hours when people who are listening listen attentively. They are not distracted . . ." (Tr. 1706). Moreover, in the context of the KBAY "easy music" program format, Snell stated that it was the most workable time to place public affairs programming. Snell is of the opinion that KBAY's audience would be reduced if a fifteen minute talk program was broadcast at an hour when listeners were accustomed to listening to background music (Tr. 1706).

46. According to United, listener response to the 12:00 midnight to 6:00 a.m. public affairs programming is reflected, in part, by several letters the station received addressing editorials scheduled in that time period. For example, between May 13 and 31, 1974, the station received letters concerning an editorial defending ex-President Richard Milhous Nixon which had been broadcast in that time period. A letter of May 22, 1974 discussed an editorial pertaining to the enlargement of the San Jose Airport. A June 9, 1974 letter referred to an editorial on drug abuse. Both editorials were broadcast in the midnight to 6:00 a.m. time period (United Ex. 9, pp. 10–20). The Pulse, Inc. survey for the period June through September 1974 indicates that Station KBAY reached 1300 people during the average one-quarter hour between the hours 12:00 midnight to 6:00 a.m. The survey reflects that the total audience reached by San Jose stations during the average one-quarter hour in that time period is approximately 20,300 (Joint Ex. 4, p. 18). The survey also reflects that Station KBAY's audience at other times is greater, *e.g.*, the average one-quarter hour audience between 6:00 a.m. and 7:00 p.m. is 7100 (Joint Ex. 4, p. 19).

47. United submitted affidavits from Station KBAY listeners Juan de Heras, C.G. Deane, Jack P. Peak, Robert J. Hiam, William N. Kidwell, Ronald R. James, Herbert Crawford, and Bernard B. Siner. Although they all recall listening to the station during the period December 1973 to August 1974, with few exceptions none could recollect specific programming addressing community needs and problems (Tr. 735–36, 751–59, 764–75, 786, 789–90, 801–2, 813–18, 934, 1073–76, 1680). Siner could recollect an editorial broadcast during the 1971 to 1974 time period addressing the evils of alcoholism (Tr. 933). James, former Mayor and officer of the Chamber of Commerce, recalled his participation during the period 1971 to 1974 on a KBAY program where he discussed transportation problems (Tr. 1680).

ISSUE (2): Fairness Doctrine

48. Issue (2) seeks to determine whether United devoted a

reasonable amount of time to the discussion of conflicting views on controversial issues of public importance. The issue was added by the Review Board in light of the paucity of public affairs generally, the absence of a local news staff, and the licensee's failure to furnish any information with respect to its coverage of controversial issues of public importance. 59 FCC 2d at 1414.

49. In September 1974, KBAY broadcast a series of anti-nuclear power radio spots produced on behalf of Friends of the Earth, California for Safe Nuclear Energy, California Citizen Action Group, San Francisco Ecology Center and San Francisco Consumer Action and Zero Population Growth. A contrary view was expressed in a Station KBAY editorial entitled "energy shortage" recorded on December 6, 1975 (United Ex. 4, pp. 2–9). Several of United's public affairs programs addressed local controversial issues. Ray Blackmore advocated a controversial sports arena on "San Jose Yesterday and Today." In addition, such topics as civil demonstrations and the First Amendment were discussed. See para. 34, *supra*. (Tr. 1200–1211).

ISSUE (3): Promise versus Performance

50. Issue (3) concerns the apparent discrepancy between KBAY's promise of public affairs programming in its 1971 renewal application and its 1971–1974 performance. The licensee's proposal was for 2 hours and 45 minutes of public affairs programming per week. Of this amount, the Review Board determined that only one hour and 41 minutes was actually carried.[19] 59 FCC 2d at 1415.

51. The August 23, 1971 KBAY renewal application represented to the Commission that two hours and forty-five minutes of public affairs programming would be broadcast per week (Tr. 1655–56). The programs to be broadcast were "State Capital Report" (thirty-five minutes); editorials (forty-five minutes); guest editorials (twenty-eight minutes); and "Community Spectrum" (sixty minutes) (Tr. 1655–56). In response to a December 6, 1971 letter from the Chief, Renewal and Transfer Division, Broadcast Bureau, informing United that "Community Spectrum" was improperly classified (Bureau Ex. 1), United amended its application on December 13, 1971 to reflect the addition of the following public affairs programs: "Washington Window" (thirty minutes), "UN Week in Review" (fifteen minutes), "San Jose Yesterday and Today" (fifteen minutes) (Tr. 1658, 1689).

52. According to Snell, he, Farr and Hollingsworth, conferred on a daily basis about programming matters (Tr. 1694). Snell directed Hollingsworth to instruct the traffic department to schedule the public affairs programs specified in the KBAY application and also to instruct the program department to make sure that the required

[19] The Review Board stated that according to the composite week logs, the promised programs, "State Capital Report," "San Jose Yesterday and Today" and "Guest Editorials," were dropped from the schedule. 59 FCC 2d at 1415.

program tapes were available (Tr. 1690). While Hollingsworth was generally familiar with the programs specified in the 1971 KBAY application, he did not know that the licensee was committed to broadcast the programs. Nor was he knowledgeable as to the amount of public affairs programming promised by the licensee. Hollingsworth was directly in charge of programming (Tr. 1417–18).

53. Snell testified that although Station KBAY attempted to secure guest editorials it was not successful in doing so and that is why none were broadcast during the composite week. Snell testified that United broadcast an editorial during the 1971–74 license term referring to the "silent majority" and the difficulty encountered by the station in securing people to come to the station to make their views known and record editorials (United Ex. 1, p. 191; Tr. 1698). In addition, Snell stated that United broadcast eleven more minutes of editorials during the composite week then promised in the 1971 application. The editorials addressed ascertained community problems, see para. 37, *supra*. Snell acknowledged that "San Jose Yesterday and Today" was not broadcast during the composite week. He testified that Mr. Blackmore was probably out of town and therefore not available to tape the program at that time (Tr. 1699). Snell concedes that he should have reported to the Commission the absence of the program "State Capital Report" and guest editorials from KBAY's programming schedule (Tr. 1893).

ISSUE (4): Equal Employment Opportunity

54. Issue (4) seeks to determine whether United has made reasonable and good faith efforts to recruit and hire Spanish-surnamed persons. The Review Board stated in adding the issue that if the licensee has been unable to hire such individuals despite recruitment efforts no sanctions will be imposed. 59 FCC 2d at 1424–25.

55. United's Annual Employment Report for 1975 reflects that no Spanish-surnamed personnel were employed by the station as of March 31, 1975 (PCI Ex. 42). According to the 1970 Census, 17.5 percent of the county of Santa Clara, where San Jose is located, falls under the category "Spanish language and/or surname" (United Ex. 16, p. 29).[20]

56. During the period 1971 through 1976, Station KBAY hired a total of 52 employees. The following Spanish-surnamed or Spanish-

[20] However, according to a May 11, 1976 report by the County of Santa Clara Planning Department, only 11.6 percent of the population is actually of Spanish heritage. The report claims that the "Spanish surname and/or language" category includes persons who are not of Spanish heritage but have the same surnames (United Ex. 16, p. 22, 29).

language employees were hired during that period: Maria Augusto, a secretary, September 1971; Jorge Layton, a custodian, April 1971;[21] Diane Vasquez, office help, May 1972; Rebecca Torres, typist, 1973; Elsa Hernandez, receptionist, June 1974; and Roy Avila, a station announcer, April 1975 (United Ex. 7 (a), pp. 1–3). During 1977, four Spanish-language or Spanish-surnamed persons were hired to work at Station KBAY. Janet Cesania was hired as a trainee-announcer at the station. Jean Hernandez was hired as a receptionist and Elsie Ferman was hired as a bookkeeper. A bookkeeper, Jessie Munos, was also hired, but she is no longer in KBAY's employ (Tr. 1399–1400).

57. United has undertaken efforts to recruit and hire minority employees. On May 9, 1973, Hollingsworth met with other San Jose radio and television executives to plan the Santa Clara County Skills Bank. The purpose of the bank was to encourage minorities to become proficient in broadcasting skills. A scholarship program in conjunction with the bank was established (United Ex. 6, pp. 2, 6–7). Hollingsworth was elected treasurer of the bank and a member of the executive committee (United Ex. 6, p. 2). Station KBAY broadcast announcements advertising the Santa Clara County Skills Bank in April, 1975 (United Ex. 6, p. 7). In addition, Kevin McKay, Client Relations Director for United's stations, had a number of meetings commencing in 1971 with James E. Stratten, then Chief of the Division of Apprenticeship Standards for the State of California (hereinafter "the Division") (United Ex. 6, p. 3; United Ex. F., p. 2; Tr. 2649). According to Stratten, he did not have any discussion with McKay regarding station KBAY's employment of Spanish-surnamed individuals (Tr. 836). However, he did have discussions with Snell and McKay regarding affirmative action. The theme of those discussions was the development of guidelines for the establishment of equal opportunity in apprenticeship-level hiring in the communications field. Stratten enlisted the help of KBAY in the development of standards in apprenticeship hiring. However, Stratten left his position with the Division before the completion of the project (Tr. 834–41, United Ex. 7, p. 2, United Ex. 26, p. 5–6).

58. Letters maintained in Station KBAY files reflect that in 1972 Henry Breitross, Department of Communications, Stanford University, Jack A. Peterson, Director of Continuing Education, University of Santa Clara and Clarence Flick, Director, Radio-TV Department, San Jose State College, were contacted by United in an effort to obtain minority personnel. Furthermore, letters dated in 1974 reflect that United contacted, among others, Manuel Lerma, the Model Cities Program, Ray Rodrigqez, Chicano Airways Committee, Jose Villa, Executive Director, Mexican-American Community Service Agency, Gus Adams, Indian Center of San Jose, Jose

[21] Eventually Layton's duties were expanded to include dubbing tapes (United Ex. 7).

Vasquez, Chairman, Chicano Employment Commission and George Castro, President, Mexican-American Political Association, seeking minority and, in particular, Spanish referrals for employment at the station (United Ex. 7, pp. 30–31; Tr. 2178–9).

59. Victor H. Camacho, Affirmative Action Officer for the Campbell Union School District, Santa Clara County, stated that since December 1975, he has worked with Kevin McKay implementing KBAY's affirmative action program. Camacho stated that he has interviewed individuals from minority and ethnic groups with a view toward employment at the station. Camacho referred Gary Dias, Susie Garcia and Jessie Munos to Station KBAY for employment (United Ex. 26, p. 15, Tr. 1006–09, 1014). Comacho recommended Garcia for a receptionist-typist position and Dias for an announcer position. United hired both individuals on Camacho's recommendation (Tr. 1012–1015, 1026).

60. In 1976, the station made additional efforts to obtain Spanish-speaking employees. An advertisement was placed by the station in the California Affirmative Action Bulletin advertising a secretary-typist position (United Ex. 7, p. 18). In a letter of April 16, 1976, the Santa Clara Valley Broadcast Skills Bank was requested to refer to KBAY a Chicano woman to work in the traffic department (United Ex. 7, p. 14). A letter was sent to Clarence Flick, Director Radio-TV Department, San Jose State University, by Steve Snell, KBAY program director. It stated in part:

> As of this date, I have not been approached by any students at all from San Jose State. Does this mean there are no minority students? Or, does, it mean there are none interested? (United Ex. 7, p. 7).

61. Joe E. Levitt, President and General Manager of KXRX and General Manager of KEZR(FM), San Jose, and Dan Tapson, General Manager of radio Station KONE, San Jose, testified as to the difficulty in obtaining Spanish-surnamed or Spanish-ethnic employees (United Ex. 6, p. 8–9).

62. Relying upon information furnished him by an employee, Levitt testified that his stations were not able to find a good source from which to obtain Spanish-speaking employees. Levitt said that KXRX was instrumental in forming the Santa Clara Skills Bank, but that the bank had not proven to be a good source for Spanish-language personnel (Tr. 1032–33). In addition, Levitt testified that KXRX has sought out private and public manpower organizations, participated in high school career days and sponsored an entry-level training program and internship[22] in an effort to employ Spanish-language individuals (Tr. 1034–1038). Levitt stated that KXRX has a staff of 40 full-time and 20 part-time employees. The station employs

[22] Levitt stated that the training program related to news and that it had not been productive (Tr. 1038).

4 full-time and 3 part-time Spanish-surnamed persons (Tr. 1031–32). KEZR employs a staff of six full-time and three part-time employees. One full-time and two part-time employees are Spanish-surnamed (Tr. 1032).

63. Tapson also testified that Station KONE was unable to locate a good source for Spanish-speaking personnel (United Ex. 6, p. 8). According to Tapson, Station KONE employs a 20 person staff. Five of the staff are part-time. One full-time Spanish-speaking individual is employed in a management sales position (Tr. 1061). Station KONE also accepts a student from San Jose State College in an internship program (Tr. 1064). Tapson was President of the Santa Clara Skills Bank for the year 1975 (Tr. 1064). At that time a coordinator was hired who went out to make contacts to obtain minority applicants. Despire the foregoing, the bank was not a good source for Spanish-speaking personnel (Tr. 1062–63).

Public Communicators, Inc.

ISSUE (a): Financial Qualifications

64. This issue seeks to determine whether the cost estimates proposed by the applicant are sufficient to construct the station and operate it for a period of three months and whether it will have available sufficient funds to meet those costs. 59 FCC 2d at 1364. PCI estimates that total costs for construction and first three-months operation will be $26,050 (Tr. 2475–6). The amount of the total funds allocated for construction is $12,700. PCI's application does not reflect nor was David McNeil, the PCI principal who testified with respect to the financial issue, able to provide a breakdown of the construction costs (Tr. 2476). The specific cost estimates reflected in the PCI application are as follows (PCI Ex. 2, p. 10):

> Antenna system: $1,750 RF Generating Equipment: $5,350 Misc. Equipment: $2,000 Studio Construction: $2,000 Legal costs and public notice: $1,000 Engineering costs: $600

The total amount of funds allocated for three months operating expenses is $13,350 (PCI Ex. 2).

65. David McNeil is the applicant's president and acting technical director (Tr. 2459–2552). He conceded that operating costs to be incurred by the applicant would amount to "a couple of thousand" more than the proposed $13,350 (Tr. 2476, 2552, 2563). Funds have not been allocated for program origination equipment or for tower and transmitter site rent (Tr. 2486). A total of $30 a month has been allocated for studio rent. McNeil testified that the proposed low-rent studio may not be available at the time of the license grant and that no contingency funds have been set aside for rent if the studio is not available (Tr. 2562). According to McNeil, the category "legal fees, public notice" includes registration or business taxes and legal fees that may be required prior to going on the air (Tr. 2487). McNeil

testified that PCI hopes to obtain volunteer counsel. However, none has been secured and no additional funds have been set aside in the event that volunteer counsel cannot be secured (Tr. 2563). Moreover, the antenna system estimate of $1,750 is based on the funds required for a 3-bay antenna. PCI's application reflects a proposal for a 6-bay antenna. There is no record evidence as to the cost of a 6-bay antenna (Tr. 2549–50). Estimated engineering fees are based on McNeil's "own personal suspicions"[23] (Tr. 2488). In addition, McNeil did not have a record of PCI's budget for such items as telephone lines and service (Tr. 2562). All of the PCI equipment-related estimates are based upon a proposed acquisition of used equipment (Tr. 2553–54).

66. To meet the estimated construction and first three-months operating costs, PCI relies upon loans from the following persons:[24] Lucius R. Eastman, Jr. ($5,000), Michael G. Chatzky, President, International News Keyus ($4,000), Phil Jacklin ($2,500), Lawrence Bensky ($2,500), David McNeil ($3,000), George Conklin Jr. ($5,000), Myrna Fabbri ($8,000) and Len Krimerman ($8,000). The monies relied upon total $38,000 (PCI Exs. 2, 2A).[25] All of the loans are to be unsecured and repaid by PCI at a rate of 10 percent annual interest in no more than three years after PCI begins broadcasting (PCI Ex. 2).

67. Lucius Eastman, Jr.'s October 8, 1975 financial statement reflects liquid assets in the amount of $1,000. His pledge to PCI is in the amount of $5,000 (PCI Ex. 13, p. 2; Ex. 2 p. 2–4; Tr. 2127). International News Keyus, Inc. relies upon its August 1, 1974 to June 30, 1975 statement of income, expenses and retained earnings to demonstrate sufficient liquidity for the promised $4,000 loan to PCI. However, the financial statement reflects losses during that period in the amount of $26,794 and no current assets (PCI Ex. 2, p. 5–8, Ex. 13, p. 3–4).

68. To support his pledge of $2,500 to PCI, Phil Jacklin relies on a financial statement of July 26, 1975. The financial statement reflects no liquid assets (PCI Ex. 2A). Len Krimerman's financial statement, dated October 4, 1974, reflects $16,600 in liquid assets sufficient to support his pledge to PCI in the amount of $8,000. According to the statement, Krimerman has not incurred any liabilities (PCI Ex. 2A; Tr. 2306).

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[23] McNeil is a history professor at San Jose State University. He is not an engineer. (United Ex. C).

[24] Jon Newhall, proprietor of Zodiac News Service, pledges to provide to PCI a free one-year subscription to its materials. This subscription constitutes a contribution of $520.00 according to Newhall (PCI Ex. 8).

[25] PCI also indicated at hearing that it relies upon a $1,000 loan from Florene Poyadue (Tr. 2274–75). While Poyadue claimed that she had sufficient liquid assets to cover a $1,000 loan to PCI, no financial statement or balance sheet have ever been submitted for Poyadue. Moreover, PCI's application has never been amended to reflect reliance on a loan from Poyadue.

69. To support his pledge of $2,500 to PCI, Lawrence Bensky in a letter of August 29, 1975 stated that he had in excess of $5,000 in the Eureka Federal Savings and Loan Association, San Francisco. A financial statement dated October 15, 1974 indicates that Bensky has no liabilities (PCI Ex. 2A). David McNeil has pledged to loan PCI the sum of $3,000. A financial statement dated October 17, 1974 indicates that McNeil has $2,482 in bank accounts. In addition, he testified that he holds a ninety day certificate of deposit in the amount of $1,000. The financial statement reflects no short-term liabilities. The only long term liability noted is the mortgage on McNeil's house (PCI Ex. 2A; Tr. 2467–69).

70. To support his pledge to loan PCI $5,000, George C. Conklin, Jr. relies upon his personal funds of $10,000 in a savings and loan association account as reflected in a financial statement of October 20, 1974 (PCI Ex. 2A). In addition, Conklin testified that his net worth has increased as the result of a bequest by approximately $100,000 since the completion of the financial statement (Tr. 1551–58). Conklin stated that the rate of interest to be applied to the loan has not yet been determined (Tr. 1561). An October 25, 1974 financial statement for Myrna Fabbri demonstrates that he has only $1,700 in liquid assets available to support her loan to PCI in the amount of $8,000. Fabbri has also incurred short-term liabilities in the amount of $600 and long term liabilities in the amount of $31,500 (PCI Exs. 2A; 13, p. 1).

ISSUE (b): Availability of Transmitter Site

71. PCI proposes to use the same tower that KBAY is presently using and to mount its antenna in the same position as the existing station KBAY system. KBAY's antenna is located on the summit of Mount Loma Prieta on a tower owned by Gill Industries, licensee of television Station KNTV, San Jose, California. The summit of Mount Loma Prieta consists of two contiguous parcels of land. One portion is owned by the Chy Company of Sacramento, California. The other is owned by Richard D. Spight and his partner Jay Watson. The two owners have entered into an agreement to jointly manage the two sites. Gill Industries has a lease with the Chy Company for its tower and transmitter building sites. The lease extends until 1985 with an option available to Gill Industries to renew for another ten years (United Ex. A, p. 1–2; PCI Ex. 17).

72. Gill Industries has subleased space on its tower to United. The United-Gill Industries lease also extends to 1985 with an option available to United to renew for another ten years. Robert M. Hosfelt, Vice-President and General Manager of Station KNTV, testified that he would not accept PCI's application for space on the KNTV tower. According to both Spight and Hosfeldt, the KNTV tower has used up its maximum allowable wind loading capacity. In addition, Snell stated that if United was no longer involved in FM

broadcasting, it would still be in the communications business and thus would retain its leasehold on the KNTV tower. In that event, Snell stated that United would lease the antenna space to some other communications company. He stated that United would not rent out the space to PCI because Snell considers the applicant a bad credit risk. (Tr. 1156, 1158–59, 1180–81; 1859–61, 2155–56, 2161–63; United Ex. A, p. 1–2; PCI Ex. 17, p. 2).

ISSUE (c): Technical Qualifications

73. Issue (c) seeks to determine whether PCI possesses sufficient and suitable technical equipment to operate its proposed station. The instant issue is based upon the applicant's statement to the Review Board that it may or may not use the Hilsabeck/Droese studio equipment represented in its application. The Board concluded that the applicant's statement raised serious questions concerning the adequacy of its proposal. 58 FCC 2d at 1354–55.

74. PCI stipulated that the Hilsbeck/Droese studio equipment was not available and would not be used by the applicant (PCI Ex. 20). That equipment consisted of the following:

1 McMart in Model B-502 Five Mixer Audio Control Console-Stereo
2 Russco Cue-Master 3-speed turntables
2 Russco Model RA-12 12 inch tone arms
2 Stanton Model 68 1EE Phone Cartridges
2 Ramko Turntable Pre-Amps Model SP-8E
2 Otari MX 7000 2SP Two-channel, Stereo Record/reproducer in portable case
2 Electro-Voice Model 1751 Electret Condensers, cardiod pattern
2 Studio Monitor Speakers
1 Audio Lab Bulk Tape Eraser (PCI application, Exhibit 7).

The PCI application was not amended to reflect any substituted studio equipment (Tr. 2559, United Ex. C).

ISSUE (d): Staff Adequacy

75. When the Review Board added issue (d) it stated that a substantial question had been raised as to the adequacy of PCI's staff to effectuate its proposed operation of 168 hours per week. The Board noted that there was no indication in PCI's application as to what duties and responsibilities it intended to assign to each of its four full-time employees. The Review Board stated that, on its face, PCI's staffing plan appeared unrealistic in light of the extensive public affairs programming and local news coverage proposed. Moreover, as to PCI's representation that the station will be staffed almost exclusively by volunteers who will be trained to operate the station, the Review Board stated that the applicant failed to provide any assurance that its proposed volunteer help would actually be available. 58 FCC 2d at 1357–58.

76. David McNeil testified that PCI proposes to broadcast 24 hours a day, 168 hours per week (Tr. 2509). The proposed locally produced programming includes the following: "Youth Forum," a thirty-minute program broadcast once a week; "Consumer Report," five minute spots broadcast twelve times a week; "Women's Program," a thirty-minute program, broadcast once a week; "Mini-Series,"[26] a ten-minute program broadcast ten times a week (Tr. 2511); "City Council Spots," two-minute programs broadcast twice daily; "Health Program," a five-minute program broadcast six times a week; "Service Awareness Spots", five-minute programs broadcast twice a day; "Citizens Editorials" two-minute programs broadcast three times daily; "Free Speech Messages," one-minute broadcasts, aired several times a day;[26] "You and the Law," a ten-minute program broadcast once a week;[26] and "Children's Hour," a one-hour program broadcast once a week (Tr. 2512–15). According to McNeil, over the course of a year the programs "Youth Forum" and "Consumer Report" will require "hundreds of volunteers" (Tr. 2517). "Women's Program," "Mini Series," "Health Program," "You and the Law" and "Children's Hour" will each require approximately two volunteers a week. NcNeil defines a volunteer as someone who will work five to ten hours per week at the station (Tr. 2530). The paid station staff will work on the Service Awareness and City Council Spots (Tr. 2522–23).

77. PCI proposes four paid staff persons, consisting of a sales director, an engineer, a news director and an "access" director (Tr. 2531). They will each work forty hours a week. All of the paid staff will be required to work with the volunteers (Tr. 2530–31). The "access" director, station manager and news director are primarily responsible for station programming. The "access" director is responsible for coordinating the responsibilities of the station volunteers (Tr. 2527–8). The station manager will not be paid during the first three months of station operation (Tr. 2531). Proposed staffing plans do not provide for a staff member to be at the station at all times it is operating (Tr. 2534). To meet its requirements for volunteers, PCI relies upon pledges of volunteer time to the station by thirteen persons. In total, 143 hours of volunteer time per week have been pledged to PCI (PCI Ex. 23).

78. Ramiro Vasquez Ascencio has pledged that he will devote fifteen hours per week to the operation of the proposed station. He expects that his primary responsibility at the station will be news gathering. The pledge of volunteer time will be in effect for two years. Asencio is employed in a forty hour a week job and must also attend Army Reserve sessions one weekend a month (Tr. 2442–45; PCI Ex. 23).

79. Father Barry Verdi, a professor of Television and Communi-

[26] These programs will be broadcast more than once (Tr. 2514, 2519).

ty Media at San Jose State University and a priest at the Episcopal Community Church in San Jose, has pledged to devote three hours per week to the proposed station working in the areas community and access outreach, public relations, market research and analysis and commercial spot production.[27] The commitment is open-ended. Father Verdi lives in Alameda, a fifty minute drive from San Jose. He is involved in University associated activities approximately three days a week and his church activities occupy approximately three days a week (PCI Ex. 23; Tr. 1952–57).

80. Charles Sweeney pledged to devote 10 hours per week to PCI. The time period for which the pledge is good is open-ended. Sweeney is a music editor for a Zodiak News Service. He lives in Oakland, approximately an hour and a half from San Jose. Sweeney states that he could do work for the proposed station using his home production facilities. His interests are in the areas of on-air personality, production of programs, commercial spots and news. Although Sweeney had not yet secured permission from Mr. Newhall, owner of Zodiak News Service, he stated that six of the ten hours pledged would be time spent doing interviews for Zodiak and that they would also be used for PCI (Tr. 2351–58, PCI Ex. 23).

81. Lawrence Bensky has pledged to contribute his services as station manager. He will not expect to be paid a salary during PCI's first three months of operation. At the time of hearing he was not employed. He stated that his pledge would depend upon whether he was employed at the time of a grant of the PCI application. He indicated that if he was employed at that time he may not be available to work as the volunteer station manager (Tr. 2030; PCI Ex. 11). In fact, Bensky testified that he is actively seeking employment (Tr. 2032). Although Bensky stated that his primary responsibility as station manager would be to coordinate volunteers, he has done nothing to establish a plan by which the station would obtain such volunteers (Tr. 2034).

82. Also contributing ten hours of time a week to PCI is Al Calame, a handyman. Calame is interested in working at the station in the areas of program production, news, community and access outreach and general maintenance. Calame stated that he works approximately twenty hours a week in his regular employment (PCI Ex. 23; Tr. 2058–59).

83. Myrna Fabbri is a full-time secretary employed forty hours a week by San Jose State University. She pledges to work 15 hours a week at the proposed station. She does not expect to receive a salary for her work. She intends to work two hours each day at the station, Monday through Friday, and every Saturday. The pledge of volun-

[27] Each proposed volunteer filled out a "volunteer pledge form." The form includes a list of areas that require volunteers. Each volunteer checked the activities in which he was interested. None of the volunteers had given thought to the precise amount of time that would be allocated to each category (Tr. 2059, 2077–78, 2132).

teer time is valid for two to three years from the date of the hearing. Fabbri will do secretarial, accounting and general office work at the station. She noted that some of the work could be done while she was at home and that she may be able to fulfill her pledge by working a portion of the 15 hours per week at home (Tr. 2128, 2130–32; PCI Ex. 23).

84. Cathell Toscan, production assistant for a television station, has pledged three hours of volunteer work a week to the proposed PCI station. Toscan will work in the program production and community and access outreach areas. Toscan is also an active member in the organization Committee for Open Media. She is employed thirty to forty hours per week. Toscan lives in Oakland, (Tr. 1884–9; PCI Ex. 23).

85. Steven Burt pledges to work ten hours per week at the station. Engineering work is among his areas of interest. Burt is currently working on a Bachelor of Science degree in Industrial Technology. He is in his senior year of school. Burt holds a second class operators permit and plans to apply for a first class license. His pledge of time is valid for at least a year from the date of the hearing. Burt admitted that he wanted to obtain a paid position at the station, as opposed to being an unpaid volunteer. During summers, Burt works at a temporary job (Tr. 2135–40; PCI Ex. 23).

86. Ricardo Cantu pledges ten hours per week to the proposed station. According to Cantu, the time pledged will not be for work done at the station itself. Beginning in September 1977, Cantu will be away from San Jose attending the University of California Law School at Los Angeles. Cantu stated that he will work for PCI while at law school, by providing legal services for the station (Tr. 2600–4, United Ex. 23). Armando Valdez pledges to contribute ten hours per week to the station. He proposes to work in the community and access outreach, promotions, publicity, and market research and analysis areas. According to Valdez, his pledge is valid for five years from the date of the hearing. Although he works 40 hours a week, Valdez stated that his job is flexible. He lives 45 minutes from the proposed station location. Valdez stated that he has only generally discussed his duties at the station with the PCI Board of Directors (PCI Ex. 23; Tr. 2669–71, 77–78).

87. Mary Jo Foote has pledged to devote two hours per week to the operation of PCI's proposed station. She would like to work in the areas of public relations and news (PCI Ex. 23). The commitment is valid for an indefinite period (Tr. 2234). Ms. Foote is a sailing instructor and she claims that her working hours are flexible. She lives approximately an hour away from San Jose (Tr. 2235–36). Similarly, Florene M. Poyadue has pledged five hours toward the operation of the proposed station. She intends to do secretarial work for PCI. She will also participate in the program production and community and access outreach areas. Poyadue has expressed

interest in becoming a station announcer (PCI Ex. 23). According to Poyadue, her pledge is valid for at least two years from the date of the hearing (Tr. 2278). She lives in San Jose and works approximately 20 hours per week as a nurse-educator (Tr. 2279). Poyadue has several small children and although she is vice-president of PCI, her commitments did not allow her to participate extensively in the hearing proceeding[28] (Tr. 2281).

88. In a letter of February 1, 1977, Bill Hartman states that he is prepared to devote as much as ten hours per week to news and/or public affairs programming at the PCI station (PCI Ex. 22; Tr. 2240–41). He is the business manager for Zodiak News Service (Tr. 2241). Hartman said that he would work in the San Francisco-Oakland area writing news and sending PCI news copy (Tr. 2243–44). However, Hartman's prior experience in news reporting is limited to covering a few stories on a volunteer basis for radio station KPFA and infrequently writing news copy (Tr. 2244).

ISSUE (f): Ascertainment

89. The ascertainment issue designated against PCI by the Review Board inquires into whether PCI interviewed community leaders in areas beyond the city of license; whether PCI's demographic data is sufficient with respect to governmental organizations, public service organizations, and civic and educational activities in San Jose and whether PCI adequately interviewed representatives of these organizations; whether PCI properly listed the ascertained community problems in San Jose; and whether PCI's survey of the general public included consultations with a random sample of members of the general public. 58 FCC 2d 1365.

90. PCI states in its application that its primary service areas are the city of San Jose and Santa Clara County and that its secondary coverage areas include the cities of Berkeley, Monterey, Oakland and San Francisco, and the counties of Alameda, Contra Costa, Marin, Merced, Monterey, Napa, San Francisco, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. 58 FCC 2d at 1361, n. 42. (Tr. 2323–24, United Ex. C). The instant issue was designated, in part, by the Review Board because it was not apparent from PCI's application that it had interviewed leaders from Alameda, Contra Costa, Marin, Merced, Napa, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. 58 FCC 2d at 1362. The ascertainment portion of PCI's application was not amended after addition of this issue. Len Krimerman, PCI Board member responsible for ascertainment, testified that the community of license was emphasized in the applicant's ascertainment. In addition, it was expanded to include Santa Clara County, San Mateo and large cities as San Francisco and Oakland (Tr. 2319–20). According to Krimerman, PCI did not mean

[28] Leonard Krimerman was acting vice-president during the hearing (Tr. 2281).

to claim that it would serve *all* the communities specifically referred to by it in its application[29] but only meant to indicate that the proposed station's signal would reach those areas (Tr. 2324). Krimerman testified that PCI desired to serve San Jose, Santa Clara County, and the large cities within the signal area, namely, San Francisco, Oakland and Berkeley (Tr. 2430). Krimerman claimed that PCI determined that many of the needs and problems of the areas noted by the Review Board are to a large extent connected to or dependent upon the areas in which the ascertainment surveys were conducted (Tr. 2430). No community leaders were interviewed by PCI from the outlying areas noted by the Review Board with the exception of a few leaders from Alameda (Tr. 2320–21). Bill Hartman, a former PCI board member, interviewed Ono Solon, the director of Baria household technicians (agency to improve working conditions of domestics), Berkeley; Lorna Jones, a former member of the City Planning Commission and past president of the Victorian Preservation Society, Oakland; Les Sauer of the Senior Action Project of the Social Service Bureau of the East Bay; Councilman (City of Oakland) Joe Coto; and Jackie Jaramillo, Oakland Urban Outreach program[30] (Tr. 2248–2250). Krimerman and McNeil stated that they believed Napa, Merced, parts of Contra Costa, San Joaquin, Solano and Stanislaus were more than 75 miles from San Jose and that therefore persons from those localities did not have to be consulted (Tr. 2325, 2538).[31]

91. Question and Answer 9 of the *Primer on Ascertainment of Community Problems by Broadcast Applicants* (hereinafter *Primer*), 27 FCC 2d 650 (1971), requires such data as is necessary to indicate, *inter alia*, the governmental activities and public service organizations in the community. The Review Board determined that PCI's application reflects an absence of adequate data in this respect. Although PCI's application reflects interviews with leaders from certain public service organizations, civic groups and governmental

[29] The PCI application states that: "The broadcast frequency sought by Public Communicators serves primarily the city of San Jose and the county of Santa Clara. Its signal, however, spans the entire Bay area, and reaches south to Monterey and north into Marin and Napa counties." Thereafter the application lists five cities (San Jose, Berkeley, Monterey, Oakland, and San Francisco) and 13 counties (Santa Clara, Alameda, Contra Costa, Marin, Merced, Monterey, Napa, San Francisco, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus) and their respective population. The population figures are added and PCI concludes: " . . . the total population in those counties into which our signal would reach is 5,405,343." (PCI application, Ex. 8; Tr. 2644).

[30] According to Hartman, the interviewees all worked and lived in Alameda County (Tr. 2248).

[31] San Joaquin is 106.6 miles from San Jose, and Merced is 77.4 miles from San Jose. These distances were calculated in accordance with Section 73.208 and 73.611 of the Commission's Rules. City reference points used were those listed in the index to *The National Atlas of the United States of America*, United States Department of the Interior Geological Survey, Washington, D.C.

bodies, the Board stated that this was not sufficient to overcome PCI's failure to specify the groups comprising the community of license. 58 FCC 2d at 1362.

92. PCI failed to amend its application to include information setting forth the community's public service organizations, civic groups, and governmental bodies (United Exhibit C). The Review Board noted that the Directory of Health, Welfare and Recreation Agencies and Services for Santa Clara County 1975–1976 (United Ex. D) contains sufficient indication that there are numerous educational and civic organizations to warrant further inquiry at hearing. 58 FCC 2d at 1362[32].

93. Krimerman, who coordinated and supervised PCI's ascertainment, conceded that the demographic data relied upon by PCI and included in its application did not set forth any governmental organizations, public service organizations or civic and educational activities (Tr. 2339–2343). Nevertheless, Krimerman stated that PCI had interviewed leaders from governmental, public service, civic and educational organizations. Among those interviewed by PCI were Gloria Broadnex, parent coordinator, head start program, San Jose; Steve Brooks, president of the citizens advocate union, Oakland; Vito Cahgemi, Chief Health Educator, Santa Clara County; Norman Mineta, former mayor of San Jose and candidate for Congress; Edward Millson, manager of the Sunnyvale Chamber of Commerce; Madge Overhouse, coordinator of the Santa Clara County Democratic Party; Norman Paul, mayor of Campbell; Harold Johnson, chief of police, Los Gatos; and George Milias, state assemblyman and former deputy assistant secretary of defense (Tr. 2340–2). Educational leaders interviewed were Gerald Brock, principal, Baywood Schools, San Mateo; Jesse Fajardo, Instructional Coordinator, County Office of Education, Santa Clara County; Gene Goldberg, Superintendent of Recreation, Department of the Town of Los Gatos; Ren Gonzales, Administrator, Santa Clara County migrant education; John Groh, student body president, Santa Clara high school; John Hanson, mental health educator, Santa Clara; Douglas Hardy, sociology professor, San Jose State University; Ruth Jones, Director, Montes-

[32] PCI's ascertainment exhibit (PCI Ex. 25) contained a list of ascertained problems and interview forms. The forms indicate that the following community leaders were interviewed: Jerry Adams, manager, Central Bank, Alameda; Steve Brooks, President, Citizens Advocate Union, Oakland; John Christensen, Oakland Chamber of Commerce; Joe Coto, City Council, Oakland; Jackie Jaramillo, Center Manager for Urban Outreach Program, Oakland; Lorna Jones, Victorian Preservation Society, Alameda County; Andrew Mazer, People Energy, National Counselling Group, Oakland; Margueritte Stinnett, School Board Director, Oakland Board of Education; Leslie L. Sauer, Director, Senior Action Project, Social Service Bureau of the East Bay, Alameda; Ona Solon, Director, Bay Area Association of Household Technicians, Berkeley; Frank Yoon, Bay Area Coalition of Koreans/East Bay (Alameda); John Denton, Lecturer, University of California, attorney, urban economist, Alameda (PCI Ex. 25, pp. 13–32).

sori Schools; and A. H. Kopp, principal, Hover Elementary School, Cupertino school district (Tr. 2344–45).

94. Question and Answer 22 of the *Primer* provides that an applicant must list *all* ascertained community problems in its application. Krimerman admitted that PCI did not comply with this provision (Tr. 2316). However, Krimerman testified that he prepared a list of all the ascertained problems[33]. The list includes 260 problems (PCI Ex. 25, pp. 1–11). Not all of the problems included in the list are stated in PCI's application[34]. For example, three of the problems included in the list compiled by Krimerman were as follows (PCI Ex. 25, pp. 6):

99. Sensationalism directed against unions—not a balanced picture of unions presented by media.

102. Hospital resistance to unionization and union demands.

105. Lack of union organization and under-representation of laborers' needs. Neither union nor labor problems are referred to in the ascertainment portion of PCI's application (PCI application, Exhibit 8; Tr. 2644, 2418–19). In addition, an interview sheet for John A. Woodworth, Secretary-Treasurer, San Mateo County Central Labor Council, AFL-CIO, included the following ascertained community problems:

1. Need for programming adapted to labor interests, news of labor, local and national.
2. Union contracts—pension and welfare provisions.
3. Unemployment—such as building trades (United Ex. I, p. 12).

95. According to Krimerman, PCI Board members had meetings approximately once a week during the period September through October 1974 in which the requirements of the Commission's ascertainment process were discussed. At those meetings, copies of the *Primer* were distributed to the PCI Board members and discussed (Tr. 2327–8, 2331). The PCI Board members conducted the survey of the general public. In addition, persons who attended meetings held by PCI also participated in the general public survey under the supervision of the Board members (Tr. 2331). Written instructions were given to each participant. The instructions explained how to relate the purpose of the survey to the interviewee:

"Hello, I am calling for PCI, trying to get an idea of what people in this area feel are the primary problems and needs of the

[33] During the admissions hearing in this proceeding, Krimerman represented that PCI members other than himself prepared the list of problems (Tr. 526). During the hearing he stated that his comments during that session had been in error; that he had only given the exhibit a superficial inspection prior to the hearing (Tr. 2414).

[34] PCI's application has never been amended to include the list of problems ascertained.

community. We have chosen you at random and would like to ask a few questions" (Tr. 2332).

96. Two methods of selection were used by PCI in its survey of the general public. In 25 percent of the interviews, persons were selected at random from the Oakland and Berkeley (but not San Jose) telephone directories. A name was selected from the middle of the page or the first name on a page was called (Tr. 2332–4). The remainder of the interviews were allegedly conducted in person at various street corners in San Jose. PCI sought to get a "more honest" response from the interviewees through personal interviews. They feared that telephone calls could result in hasty, inaccurate responses by those in a hurry to get off the telephone (Tr. 2334). No PCI director maintained a record of the street corners used for the general public surveys and no director could provide this information at the hearing. However, according to Krimerman, the interviewers did report back to him as to the length of time spent at a particular corner and the number of people interviewed there (Tr. 2336, 2542–47). To insure that a random selection was made, every tenth person who passed a particular corner was interviewed (Tr. 2334–6; 2590). According to Krimerman, the PCI board of directors selected street corners where a cross-section of the San Jose area population would be expected to come. For example, a county bus corner would be selected near city hall where major banks and shopping centers were located (Tr. 2434). However, testimony by McNeil disclosed that at least three of the corners selected (Second and San Carlos; First and San Antonio; and Third and San Carlos) were in close proximity to San Jose State University, the institution with which many of the PCI Board members are associated (Tr. 2590–91).

ISSUE (g): Certification Issue

97. The Review Board determined that a serious question had been raised as to whether PCI had complied with the signature certification requirements of Commission Form 301. David McNeil, president of PCI, signed the application on October 28, 1974, thereby acknowledging that he had familiarized himself with the instructions concerning signature requirements and certifying that the statements contained in the application were true, complete and correct. The typed date in Exhibit 5, PCI's balance sheet, however, is October 31, 1974. 58 FCC 2d 1363.

98. David McNeil testified that he read the entire PCI application before he signed it. He explained that Jeremy Milan (the engineer used by PCI) had previously typed the date October 31, 1974 on the balance sheet. However, McNeil did not recall the October 31 date when he signed the application. McNeil stated that he made a trip to Los Gatos specifically to sign and certify the PCI application. On that same date, the entire document was flown to Washington,

D.C. According to McNeil, nothing was added or removed from the application from the time it was signed by him and the time it was filed on November 1, 1974. (Tr. 2498, 2500–2503; United Ex. C, p. 321).

CONCLUSIONS OF LAW

United Broadcasting Company (KBAY)

ISSUE (1): Public Affairs Programming

99. *In the matter of Formulation of Policies Relating to the Broadcast Renewal Applicant (Docket No. 19154)*, 66 FCC 2d 419 (1977) it was held that licensees must present a reasonable amount of local and informational programming to justify renewal, but that the government should not impose a national standard of performance in place of the independent programming decisions of the licensee attuned to the needs of the area served by said licensee. Further, in *RadiOhio*, 38 FCC 2d 721 (1973), the Commission set forth that a large amount of discretion is vested in the licensee as regards his programming and that the Commission will not interfere with this discretion in determining the amount, kind and time periods during which public affairs and other informational programming should be presented to serve the community needs and interests as long as there is absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its discretion in its overall programming. As for the timing of public affairs programming, the Commission rejects charges that the scheduling of public affairs programming at particular times of the day or on certain days is not responsive to the ascertained community needs. *SRD Broadcasting, Inc.*, 57 FCC 2d 354 (1975); *Storz Broadcasting Company (KXOK)*, 58 FCC 2d 1333 (1975); *KSAY Broadcasting Company*, 47 FCC 2d 584 (1974); *Chicago Federation of Labor and Industrial Union Council*, 48 FCC 2d 1174 (1974).

100. United's station KBAY has adequately served the community's needs with respect to public affairs programming during the 1971–74 license term. Both "You and Your Community" and "San Jose Yesterday and Today" can be classified as public affairs programming. "You and Your Community" is described by its interviewer, Pasqualina di Lonardo Rossetti, as being composed of discussions of community events relating to drama and music, special community events, university problems and other informative and educational matters. "San Jose Yesterday and Today" conducted by Ray Blackmore, San Jose's Police Chief for over 24 years being one of his many outstanding positions, consisted mainly of Blackmore addressing various community problems based on his personal experience in the community which were varied and

numerous and touched on all types of people and interests. Occasionally guest speakers were presented.

101. In addition, KBAY station editorials discussed topics of local significance such as school violence, local airport improvements, mass transit system, local taxation and many more numerous public service announcements were broadcast as was local newscasts and, between August through October 1974, free speech messages were placed on the air addressing such subjects as drugs, minorities, health and environment. Programs such as "Washington Window", "Perspective", "UN Week in Review" and "Overseas Assignment" addressed national matters and ascertained needs relating primarily to government. "Community Focus" addressed local community needs and problems affecting San Jose. All of these broadcasts constituted public affairs programming.

102. It must therefore be concluded that United's 1971–74 license term public affairs programming was reasonable and sufficient to justify renewal of its license. There is no evidence whatsoever that United has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its discretion in its overall programming. Both national and local matters were adequately broadcast. The fact that all of the programs were not broadcast throughout the entire 1971–74 license term is no basis for denial of the license renewal and there is absolutely no evidence of an intent to mislead the Commission.

103. As for the times of broadcast, the Commission's policy of repeated rejections of allegations that programming broadcast at particular times of the day or on certain days of the week were not responsive to the ascertained needs of the community speaks for itself. Furthermore, United has demonstrated at hearing that programming scheduled in the early morning was reasonably effective in meeting public interest obligations.

103(a). Based on the foregoing, it is concluded that United adequately served the community's needs with respect to public affairs programming in the 1971–74 license term.

ISSUE (2): Fairness Doctrine

104. United's KBAY, as discussed under Issue (1), *supra*, has broadcast a good many topics constituting local controversial issues. "San Jose Yesterday and Today" is a fine example of local controversial issues as well as "Community Focus". While United did not employ a local news staff, local news was broadcast by KBAY having been obtained from UPI audio line.

105. PCI contends that United has violated the fairness doctrine in failing to provide access for local voices to be heard. However, KBAY has used several local voices such as Mr. Blackmore on "San Jose Yesterday and Today". In *American Broadcasting Companies, Inc.* 56 FCC 2d 275 (1975), the Commission states as follows:

> Similarly, we find no merit to petitioners claim of lack of access for community views and voices. No showing is made by COM (the petitioners) of a specific controversial issue of public importance which ABC has failed to cover, nor do we find evidence that any specific viewpoint has not been adequately presented by the station.

Thus the Commission is not concerned with the broadcasting of specific voices but with the providing of coverage of controversial issues of local importance which United has obviously done. Also of importance is the fact that PCI was designated the burden of proceeding on this issue and has failed to do so by making no showing of a specific controversial issue of public importance which United failed to cover nor that any specific viewpoint has not been adequately presented by KBAY.

106. Therefore, it is concluded that United did not violate the fairness doctrine during the 1971–74 license term.

ISSUE (3): Promise vs. Performance

107. In the cases of *Hubbard Broadcasting, Inc.*, FCC 77–674, 41 RR 2d 979, 988 (1977); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975); and *Leflore Broadcasting, Inc.*, 46 FCC 2d 980 (1974), the Commission acted to show its intent that it would not lock a station into its program proposal during a license term but that where the licensee's composite week performance reflects a substantial reduction in the amount of non-entertainment programming previously proposed by the licensee, the latter must explain the deviation and in evaluating said explanation, the Commission considers the licensee's overall programming responses to ascertained community problems.

108. Therefore, in applying the appropriate facts to the Commission's precedent, United has complied with this standard. As discussed, *supra*, United's KBAY addressed ascertained community problems in its programming during the 1971–74 license term. While this issue was added against United because its composite week log reflected only one hour and forty-five minutes per week of the two hours and forty-five minutes of public affairs programming promised in its renewal application, United has explained satisfactorily that there was no intent by United not to present all of the public affairs programming promised in its renewal application and that said promises were, in fact, substantially performed with the exception of several deviations which were beyond United's control. United even broadcast an editorial during the 1971–74 term setting forth that it was unable to secure people to broadcast guest editorials, but to no avail. Therefore, considering United's overall programming responses to ascertained community needs and problems, United's plausible explanation as regards the deviations must be given much weight and the problem resolved in United's favor.

109. Therefore, it is concluded that United's KBAY public affairs

programming reasonably conformed during the 1971–74 license term to its proposal as set forth in its 1971 renewal application.

ISSUE (4): Equal Employment Opportunity

110. In citing this issue against United, the Review Board stated that since United has given no explanation as to why KBAY does not employ any Chicanos (as shown in KBAY's 1975 annual employment report and since Chicanos make up the largest group of minority population in San Jose and Santa Clara County), the crucial question to be resolved is whether United has made reasonable and good faith effort to recruit and hire minority members. 59 FCC 2d at 1424–25.

111. The evidentiary record makes clear that United's KBAY hired, during the 1971–75 period, six Chicanos of which four were clerical, one was a custodian and one was an announcer. In 1977, four Chicanos were hired of which one was an announcer-trainee, two were bookkeepers and one was a receptionist. Total employees, including Chicanos and others hired by the station during 1971–1976 amounted to fifty two.

112. KBAY solicited qualified applicants from quite a few educational and governmental agencies throughout 1971 to 1977, as will reflect from the record. Furthermore, throughout 1973 to 1977, it attempted to encourage minorities to become proficient in broadcast skills through its involvement with Santa Clara County Skills Bank and a scholarship program was established for this purpose. KBAY had its own affirmative action program and also advertised in the California Affirmative Action Bulletin for employment.

113. In support of United's good faith efforts of attempting to but not being able to hire a larger number of Chicanos employees, two managers of other San Jose stations vouched as to the difficulties encountered in obtaining Chicano employees.

114. It is true that United upgraded the number of Chicanos after this issue was designated against it. However, the Commission has examined post-license term employment statistics to determine whether appropriate action is being undertaken. *NBC, Inc. (WRC-TV)*, 58 FCC 2d 419 (1976); *Columbus Broadcasting Coalition* vs. *FCC*, 164 U.S. App. D.C. 213, 222 (1974). Therefore, this action by United shows its attempt to insure future compliance with the Commission's policies.

115. It is thus concluded that United provided equal employment opportunity at KBAY to Spanish-surnamed persons through its reasonable and good faith efforts to recruit and hire same.

ISSUE (5): Basic Qualifications

116. This issue is a conclusory issue and rests on the conclusions of Issues (1), (2), (3) and (4), *supra*. Consequently, as a result of these

conclusions, it is determined that United has the requisite qualifications to be a Commission licensee.

Public Communicators, Inc.

ISSUE (a): Financial Issue

117. As the findings clearly show, PCI is not financially qualified to be a licensee. PCI's argument, regarding this issue as well as several of the other issues designed against it, that the future can only be reasonably anticipated and not known, is contrary to Commission's policy and therefore cannot be considered. The Commission requires that financial statements of those lending money to an applicant reflect sufficient liquidity to support the promised loan. See *Viking Television, Inc.*, 16 FCC 2d 1018 (1969); *cf. La Fourche Valley Enterprises, Inc.*, 30 FCC 2d 539 (1971); and *Rocket Radio, Inc.*, 65 FCC 2d 589 (1977).

118. PCI's estimated cost for construction and the first three months' operation is $26,050. The total funds allocated for the first three months' operating expenses is $13,350 and $12,700 for construction. PCI did not take into consideration such items as program origination equipment, the six-bay antenna proposed, acquisition of a transmitter site or possible legal fees as well as relying on a proposed studio location for the unrealistic amount of $30 per month rent with no reasonable expectation of availability of the location or that the rent will be $30 per month at the time of a grant. PCI further made no showing that the used equipment, on which its estimates are based, is available and it has presented no alternate financial plan if the proposed used equipment is unavailable at the time of construction. PCI admitted at the hearing that sufficient funds were not allocated for anticipated operating expenses.

119. PCI relies on funds from nine individuals in the amount of $39,000, as personal loans, to meet the three months operating costs and the construction costs. However the financial statements of these individuals reflect sufficient liquid assets of only $21,200 which is insufficient to support the promised loan of $39,000 and is therefore insufficient to meet even the underestimated construction costs and the first three months' operating costs.

120. Therefore, it is concluded that PCI is not financially qualified to construct and operate its proposed station.

ISSUE (b) Transmitter Site Availability

121. When an applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available. *Ken Stephens*, 53 FCC 2d 383 (1975). An applicant, challenging a licensee, can reasonably assume that a renewal applicant, whose application has been denied, would be receptive of an offer to

purchase its transmitter and antenna sites, "absent some contrary indication or unusual circumstances". *Belo Broadcasting Corp.*, 42 FCC 2d 1011 (1973) and *Alabama Citizens for Responsive Public TV, Inc., et al*, 62 FCC 2d 755 (1977).

122. PCI proposes to use the transmitter site of KBAY on the tower of Station KNTV which is located on the summit of Mount Loma Prieta or, in the alternative, to add an additional antenna to this tower or maybe use an alternate site on Mount Loma Prieta's summit. However, Gill Industries, licensee of KNTV, owns the tower and leases to United, the lease extending to 1985. The vice-president and general manager of KNTV testified that he would not accept PCI's application for space on the KNTV tower since the tower has used up its maximum wind loading capacity. Snell of United testified that, if unsuccessful in this case, would still be in the communications business and would therefore keep its leasehold on the tower and lease the space to another communications company, but not to PCI because of a credit risk.

123. Therefore, PCI has no reasonable assurance of the availability of its proposed antenna site used by KBAY and its application does not reflect an alternate site on Mount Loma Prieta or elsewhere.

ISSUE (c): Technical Qualifications

124. PCI stipulated that the proposed Hilsabeck-Droese studio equipment specified in its application was no longer available and PCI did not amend its application to show any other such equipment.

125. Therefore, it must be concluded that PCI does not possess sufficient and suitable technical equipment to operate its proposed station, and therefore does not possess the requisite technical qualifications to be a Commission licensee.

ISSUE (d): Staffing

126. While there is no precise formula as to the number of personnel which is adequate for a given broadcast facility, *United Broadcast Industries, Inc.*, 49 FCC 2d 313 (1974), a proposal would have to be minimal indeed to be termed "inherently incapable of effectuation". *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (1974).

127. PCI, in its 168 hours of station operation per week, proposes many locally produced weekly programs, two of which will require hundreds of volunteers. PCI relies on pledges from 13 individuals which total 143 hours per week but many of these volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time, as the findings clearly show. Here again, PCI is not able to demonstrate that it has met its requirements as of the present but that "the complete list of volunteers . . . will have to wait until the awarding of the license." This is but conjecture no matter how convinced PCI is that it will so

be, and conjecture is not enough. PCI must demonstrate that its staffing proposal would not be minimal in being able to operate the station 168 hours per week and to produce the proposed programming, and it has failed to do so.

128. Therefore, it must be concluded that the staff proposed by PCI is not adequate to effectuate its proposed operation.

ISSUE (f): Ascertainment

129. A four-part ascertainment issue was added by the Review Board against PCI. The first part of the issue seeks to determine whether PCI interviewed community leaders beyond the city of license. In particular, questions were raised as to whether the applicant interviewed community leaders from Alameda, Contra Costa, Marin, Merced, Napa, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. These communities were identified by PCI as being within its proposed service area. Yet, PCI failed to amend its application after the addition of this issue to show additional community leader interviews outside the city of license. The findings demonstrate that community leaders from Alameda were interviewed. In addition, the findings show that San Joaquin and Merced are more than 75 miles from the city of license. Therefore, PCI was not required to interview leaders from those areas. Question and Answer 6 of the *Primer*. However, the findings demonstrate, based on the testimony of PCI principals, that no community leaders from Contra Costa, Marin, Napa, Santa Cruz, San Benito, Solano or Stanislaus were interviewed by the applicant. They also reflect that PCI does not intend to serve these communities. Question and Answer 6 of the *Primer* requires an applicant to explain why he does not undertake to serve a particular major city that falls within his service contours. PCI did not set forth such an explanation either at hearing or in its application. Therefore, it must be concluded that PCI did not consider its secondary service area with respect to proposed programming; nor did it interview leaders from these outlying areas as required by the *Primer*. See *Pleasant Broadcasting Company*, 40 FCC 2d 582 (1973); *Azalee Corp.*, 47 FCC 2d 151 (1974).

130. The second part of the ascertainment issue seeks to determine whether PCI's demographic data is adequate with respect to governmental and public service organizations and civic and educational activites in San Jose and whether PCI interviewed representatives in these areas. After designation of the issue, PCI failed to amend its application with supplemental demographic data or with community leader interviews representing those areas omitted in the demographics submitted by PCI. The findings demonstrate that a number of community leaders were interviewed by PCI representing various governmental, public service, civic and educational groups. Despite these interviews, there are gross deficiencies in the demographic data relied upon by PCI. Therefore, it

cannot be determined whether PCI interviewed representatives of the significant educational, public service, civic and governmental organizations in the community.

131. The third part of the ascertainment issue is whether PCI complied with Question and Answer 22 of the *Primer*, *i.e.*, whether PCI listed all ascertained community problems. The PCI principal responsible for ascertainment, Leonard Krimerman, admitted that PCI did not comply with the Commission requirement that an applicant list all ascertained community needs. The findings reflect that a list of all community needs was maintained by PCI. However, it was not made part of the PCI application. PCI's application thus fails to reflect all the ascertained needs and problems. For example, while problems relating to unions were ascertained, they were not listed in PCI's application. Therefore, it must be concluded that PCI did not comply with the *Primer* in this respect.

132. The Review Board noted in adding the fourth part of the ascertainment issue against PCI that there was no assurance that PCI's survey of the general public resulted in a genuine random sample as required by the *Primer*, Question and Answer 13(b). PCI's statement in its application that 96 persons "were interviewed in person in public areas, using a random choice procedure" did not demonstrate that the public places were selected to achieve a random sample or that such a sample was obtained.

133. The findings reflect that, for a portion of the interviews, a telephone random-selection method was used. That method would usually comply with Commission procedures. See *Midwest St. Louis, Inc.*, 62 FCC 2d 889, 892 (1977), and cases cited therein. However, in the instant case no San Jose telephone books were used. Krimerman testified that Berkeley and Oakland telephone books were used for the general public survey. Thus, the telephone surveys were not used to ascertain the needs of the city of license. In search of a "more honest" response from interviewees, PCI sought personal interviews. PCI's president, David McNeil, testified that every tenth person who passed certain selected street corners was interviewed. He stated that the street corners were selected where a cross-section of the San Jose area population would be expected to pass. However, it was disclosed that at least three corners were located near San Jose State University.

134. PCI failed to maintain any records of the street corners selected and the persons responsible for a given corner. If the survey was, in fact, conducted in the manner claimed by the PCI principal, it could be concluded that a random sample had been achieved. However, since PCI was not able to identify with specificity the location of the street corners used or identify the persons responsible for interviewing at the corners, it is not possible to determine whether in practice the survey was conducted according to the plan

set forth by the PCI principal. PCI had the burden of proof on the issue.

135. Consequently, it is concluded that PCI has not demonstrated that it has complied with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants.*

ISSUE (g): Application Certification

136. David McNeil, president of PCI, signed the PCI application on October 28, 1974, thereby acknowledging that he had familiarized himself with the application and that the statements therein were true and correct. However, a balance sheet in the application was dated October 31, 1974—three days after the date of certification. At the hearing, McNeil explained the process which lead up to and culminated with his signature on the application. He testified that he believed that the October 31 date had been typed on the balance sheet because the 31st was the end of the applicable month. McNeil stated that nothing was added to or removed from the application after he read it and certified its correctness. There is no evidence indicating anything to the contrary. Therefore this issue is resolved in favor of PCI. *Broadcast Enterprises, Inc.* v. *FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968); *Home Service Broadcasting Corp.*, 24 FCC 2d 192 (Rev. Bd. 1970); *Sioux Empire Broadcasting Co.*, 9 FCC 2d 850 (Rev. Bd. 1967); *DuPage County Broadcasting Inc.*, 9 FCC 2d 210 (Rev. Bd. 1967).

ISSUES 1, 2, e, (6) and (7): Comparative

137. Since PCI, one of the two applicants of this proceeding has been found not qualified under the basic qualifying Issues (a), (b), (c), (d) and (f) designated against it, see paragraphs 120, 123, 125, 128 and 135, *supra*, and paragraph 138, *infra*, the comparative issues are moot for conclusionary discussion.

Ultimate Conclusions

138. In summary, it is concluded that United has met its burden of proof on the issues designated against it and that the programming responsiveness, the fairness doctrine, the promise versus performance and the equal employment opportunity issues should be resolved in favor of the renewal applicant. However, PCI has failed to demonstrate the financial or technical qualifications to be a licensee. In addition, PCI has not demonstrated the reasonable assurance of the availability of an antenna site. Nor has PCI shown that the proposed staff is capable of effectuating the program proposal. Furthermore, PCI's ascertainment survey does not comply in all respects with Commission requirements. Therefore, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of United's renewal application and a denial of PCI's application for a construction permit.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276,[35] the renewal application of United Broadcasting Company (KBAY) to operate in San Jose, California, IS GRANTED[36], and the application of Public Communicators, Inc. for a construction permit IS DENIED.

JAMES K. CULLEN, JR.
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

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[35] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision will become effective fifty (50) days after its public release as prescribed by Rule 1.276(d).

[36] It is understood, however, that a grant of United's renewal application to operate Station KBAY would be without prejudice to whatever action, if any, the Commission deemed appropriate upon conclusion of the proceeding before the U.S. District Court (see p. 4, *supra*) which has now taken place as evidenced by the accepted amendment to United's application (see Order FCC 78M-1049, released July 10, 1978).

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